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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1422

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION, LEWIS J. ENGMAN, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on November 20, 1972.

Opinions Below

The opinion of the court of appeals is officially reported at 472 F.2d 179 (2d Cir. 1972) and is unofficially reported at 1972 Trade Cas. ¶ 74,260 (2d Cir. 1972). The opinion of the district court is officially reported at 343 F. Supp. 396 (S.D.N.Y. 1972) and is unofficially reported at 1972 Trade

Cas. ¶ 74,036 (S.D.N.Y. 1972). The opinions of the court of appeals and the district court are respectively set forth in Appendices A and B to this petition.[1]

Jurisdiction

The judgment of the court of appeals was entered on November 20, 1972 and is set forth in Appendix E hereto. The time within which to petition for a writ of certiorari was extended to April 19, 1973 by order of Justice Marshall entered on January 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the court below was in error in holding: (a) that soft drink bottlers are not entitled to the same standards of due process which concededly would apply in antitrust litigation if brought by anyone other than the government, and (b) that proceedings which jeopardize bottlers' property rights and are designed to restructure their industry can be prosecuted against their franchisor without joinder of the bottlers as parties.

2. Whether the court below was in error in holding that the bottlers may be bound not only by a cease and desist order against their franchisor, but also by mandatory obligations to be imposed on them by an adjudication in which they have not been joined as parties or served with process.

3. Whether, in holding that every bottler will have a right to judicial review in the district court of his choice of any FTC order, the court below disregarded the intent

[1] References to pages within the Appendices will hereinafter be cited with the suffix "a" (*e.g.*, 1a).

of Congress to confine judicial review of Federal Trade Commission orders to a single court of appeals.

4. Whether it is contrary to public policy to permit agency proceedings, which threaten to restructure an entire industry, to go forward for years without conclusively resolving the threshold question of who are the proper defendants.

Constitutional Provisions, Statutes and Rules Involved

The Constitutional provision involved here is the due process clause of the Fifth Amendment to the United States Constitution. District court jurisdiction is conferred by Sections 1331(a), 1337, 1361 and 1651 of the Judicial Code, 28 U.S.C. §§ 1331(a), 1337, 1361 and 1651, and Sections 10(c) and (e) of the Administrative Procedure Act, now 5 U.S.C. §§ 704 and 706. Other relevant provisions are Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and Rule 19 of the Federal Rules of Civil Procedure. These provisions are printed in Appendix F hereto.

Statement of the Case

The principal issue in this case is whether a government agency may lawfully institute adjudicatory proceedings to destroy contract and property rights by joining as a defendant the grantor of those rights, but not the grantees. The court below and the FTC have conceded that such a suit could not be prosecuted by a private litigant. The question squarely presented is whether a lesser standard of due process applies to suits brought by the federal government.

This issue directly affects the right to due process of some 2700 companies (every franchised soft drink bottler in the United States)[2] and has indirect application to every company which has been granted rights under a franchise or license agreement. The issue arises in antitrust actions brought by the Federal Trade Commission ("the Commission" or "the FTC") against the major soft drink franchisors to declare invalid the exclusive territories granted by them to independent bottlers, none of whom has been joined as a party by the FTC.[3]

The Rights at Stake in the FTC Proceeding

Petitioner is one of 513 *Pepsi-Cola* bottlers in the United States, operating in a geographically defined territory pursuant to a trademark license (franchise agreement) with PepsiCo, Inc. ("PepsiCo"). The franchise agreement provides that, in return for establishing a manufacturing plant and developing a market for the product, petitioner shall have the exclusive right to make and sell *Pepsi-Cola* in the territory of Corvallis, Oregon. Similar franchise agreements have been entered into by PepsiCo and its major competitors with other bottlers throughout the United States over a period of more than fifty years.

The franchising route taken by PepsiCo beginning in 1908, and by its competitors in the soft drink industry both

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[2] In briefs below, the Government claims that there are more than 2700 bottlers in the United States who would be directly affected by the outcome of the issue raised herein. Brief for Appellees at 3.

[3] In the Matter of PepsiCo., Inc., Dkt. No. 8856; In the Matter of Crush International Ltd., Dkt. No. 8853; In the Matter of Dr. Pepper Company, Dkt. No. 8854; In the Matter of The Coca-Cola Company, Dkt. No. 8855; In the Matter of The Seven-Up Company, Dkt. No. 8857; In the Matter of The Royal Crown Cola Company, Dkt. No. 8858; In the Matter of National Industries, Inc., Dkt. No. 8859; In the Matter of Norton Simon, Inc., Dkt. No. 8877.

before and after that date, was the only means by which national manufacture and marketing of bottled soft drinks became feasible. Capital investments beyond the capabilities of any franchisor were required for plants and equipment to bottle and sell soft drinks in every local area across the nation. The initial cost of returnable bottles, which were the only economically feasible soft drink containers until after World War II,[4] exceeded the cost of the product itself and dictated the structure of the industry. Bottlers had to have exclusivity, not only to survive against bottlers of competing brands, but also to recapture and obtain sufficient re-use of their own bottles to make their operations economically viable.

Petitioner became a bottler, built a plant and bought equipment for manufacture and sale of *Pepsi-Cola* in Corvallis upon the strength of the covenant in its franchise agreement that gave it exclusive rights for that trademarked product as against all others, including PepsiCo (R 8, pp. 5-6, 13-14).[5] So did 512 other *Pepsi* bottlers and thousands of competing brand bottlers in towns and cities throughout the United States, thus establishing the structure for national marketing of quality-controlled soft drink beverages.

Despite the fact that franchise agreements similar to those of petitioner had been repeatedly sustained by the courts during the past half century,[6] the FTC instituted proceedings against the franchisors in July, 1971, seeking

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[4] Returnable bottles are still the leading container for soft drinks and are the most inexpensive package, both from an economic and an ecological standpoint.

[5] Citations to documents in the Record herein are in the form "R —, p. —."

[6] See Coca-Cola Bottling Co. v. Coca-Cola Co., 269 F. 796 (D.Del. 1920); Brosious v. Pepsi-Cola Co., 155 F.2d 99 (3d Cir. 1946); Jones v. Pepsi-Cola Co., 223 F. Supp. 650 (D.Neb. 1963).

to invalidate those agreements. The complaints allege that the grant to petitioner (and all other franchised bottlers) of an exclusive territory violates Section Five of the Federal Trade Commission Act, 15 U.S.C. § 45, and the demand for relief is that such exclusivity be eliminated.

If this relief were to be granted, returnable bottles would be driven from the market along with the many small bottlers who make their use feasible.[7] The relief sought by the FTC would result in a restructuring of the industry in which territories now served by small bottlers would become the provinces of a relatively few large ones, among which would be the franchisors.[8] Although the bottler is clearly the principal target of the FTC and has distinctly different interests from those of his franchisor in preservation of the market as now structured, neither petitioner nor any other bottler has been joined as a party in the FTC proceeding or served with a copy of the complaint.

The FTC's Rejection of the Indispensable Party Defense

On October 12, 1971, PepsiCo, which had pleaded lack of indispensable parties as an affirmative defense, moved before the Hearing Examiner ("the Examiner") to dismiss the complaint or join the bottlers as parties respondent.[9] On January 20, 1972, the Examiner denied the motion. He found that the "substantial property rights these bottlers

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[7] Bottlers would be forced by the economics involved to sell only cans or non-returnable bottles for shipment either directly or through warehouses into other territories; only large, economically powerful bottlers would have that capability (R 3, pp. 65-66).

[8] The FTC Staff has conceded this point by proposing a "Metro Area Bottler Handicap" Plan, the sole purpose of which is to delay *temporarily* the demise of the small bottlers. This Plan is discussed at pp. 9-10, *infra*.

[9] The Examiner's order is reproduced in Appendix D hereto.

have acquired and own" could be adversely affected and that *"the bottlers may be considered indispensable"* [10] but concluded that "as a practical matter it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding." [11] The Examiner noted that the right to intervene had been granted to an association representing 512 of the 513 *Pepsi* bottlers in the United States and that while such intervention did not give the association the status of a "party", bottlers were being given some opportunity to participate.[12]

On March 23, 1972, the Commission affirmed the Examiner's decision and refused to suspend the FTC proceeding because of non-joinder of bottlers on the ground that under the antitrust laws "little, if any notice" of rights of third parties need be taken (44a).

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[10] 53a (emphasis added).

[11] "It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondent's trademarked products, it would be without recourse to sue the respondent for damages or for injunctive relief requiring it to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding. * * *" (53a-54a).

[12] Three *Pepsi-Cola* bottlers and the Pepsi-Cola Bottlers' Association ("the Association") have intervened before the FTC (R 3, pp. 48, 59). The Association moved to intervene, not as representative of any possible class of bottlers, but rather to adduce "general proof" (*id.*, p. 63). The Examiner has suggested that other bottler interventions would be permitted.

The District Court Action

PepsiCo then filed suit in the Southern District of New York for declaratory and injunctive relief against continuation of the FTC proceedings in the absence of the bottlers.[13] Petitioner intervened as a plaintiff in the action.

The district court (Cannella, J.) took "no position on the issue of indispensable parties", but dismissed the complaint for lack of subject matter jurisdiction. The court held that "• • • plaintiff [*sic*] has not exhausted its administrative remedies", a decision which it characterized as "in accord" with one in the Northern District of Georgia involving Coca-Cola Company and certain bottlers.[14]

Summarily rejected in a footnote were the due process claims of petitioner. The court commented only that it "does not agree" with petitioner's point that the Georgia decision is inapplicable here because unlike the *Coca-Cola* bottlers there, he is a non-participant before the FTC and therefore has no administrative remedies to exhaust.[15] The

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[13] PepsiCo, Inc. v. Federal Trade Commission, et al., 72 Civ. 1770 (S.D.N.Y. filed April 28, 1972). The defendants are the Federal Trade Commission and its five individual members, one of whom resigned after judgment was entered in the court of appeals. His successor has been substituted as a respondent in this Court pursuant to Supreme Court Rule 48 (3).

[14] 33a, *citing* Coca-Cola Co. v. FTC, 342 F. Supp. 670 (N.D. Ga. 1972), *aff'd*, 1973 Trade Cas. ¶ 74,360 (5th Cir. 1973). Appeal is pending in the Eighth Circuit from a decision denying a similar indispensable party motion in Seven-Up Co. v. Goodhope, 349 F. Supp. 551 (E.D. Mo. 1972), Dkt. No. 72-1680 (8th Cir.).

[15] 33a n.4. All parties before the Georgia district court were either parties or intervenors in the FTC proceeding and arguably had *some* administrative remedies left to be exhausted. Petitioner is not an intervenor in the FTC proceeding.

The Georgia district court decision was affirmed by the Fifth Circuit after a divided panel of the Second Circuit handed down its opinion affirming Judge Cannella's order. Reasoning that a named defendant's interest in being protected from multiple litigation

district court also noted in passing that bottlers could intervene in the FTC case with certain rights, although they would not have the right "to appeal any action taken by the FTC." [16]

The "Metro Area Bottler Handicap"

Both PepsiCo and petitioner filed notices of appeal to the United States Court of Appeals for the Second Circuit. Shortly thereafter, complaint counsel moved before the Examiner for partial summary decision on a theory of per se illegality. In an effort to diminish the injury which loss of exclusivity would inflict on petitioner and other small bottlers, complaint counsel proposed that for ten years "large" bottlers be restrained from selling soft drinks in territories of "small" bottlers,[17] "either directly * * * or

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and inconsistent decrees was recognized as a principle of equity and not as a constitutional right, the Fifth Circuit concluded that the *Coca-Cola* case fit within none of the narrow exceptions to the exhaustion requirement available in that circuit. The circuit court appeared to realize, however, that none of the parties before it had standing to raise the due process rights of non-joined bottlers such as petitioner herein:

> "In part, plaintiffs' argument is grounded not on a right unequivocally vested in them by statute but on asserted constitutional rights of third parties, namely the non-joined bottlers' respective rights to due process. It is always refreshing when giant corporations evince solicitous regard for others' rights—and we have learned to expect refreshment from The Coca-Cola Company—but it is no occasion for judicial review of interlocutory agency decisions. * * *" Coca-Cola Co. v. FTC, 1973 Trade Cas. ¶ 74,360 at 93,678.

[16] 32a n.2.

[17] "* * * [T]he large bottlers now doing business in the 200 largest metro areas * * * for 10 years [would be] limited to selling in metro areas and forbidden to sell in any non-metro areas which such large bottlers do not presently serve * * *. Thus small bottlers located adjacent to a metro area would be freed to sell into that metro area without concern that the metro bottler can retaliate by selling into the small bottlers' territory." Memorandum of Complaint Counsel in Support of Motion for Partial Summary Decision, p. 17 (R 23, p. 34).

thru [*sic*] * * * customers for resale by them." [18] Government counsel stated that this "Metro Area Bottler Handicap" was designed to "assure the competitive viability of smaller bottlers" and permit them a transition period in which to

> "accommodate themselves to this new marketplace environment without having to face competition from large bottlers." [19]

On April 5, 1973, the Examiner denied the motion for summary decision in the *Coca-Cola* case[20] without commenting on the Handicap proposal, other than to note the need for a full record before reaching "a conclusion that would result in a fundamental restructuring of a very substantial industry".[21]

The Court of Appeals' Decision

Although the court below divided sharply over its decision to affirm the district court, the majority and the dissent were in agreement on the following major points: (a) that the FTC threatens "a complete restructuring of an industry",[22] (b) that bottlers' "contract rights are at stake" [23] and (c) that bottlers have "fundamental rights * * * to be

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[18] *Id.* at 16 (R 23, p. 33).

[19] *Id.* By this extraordinary proposal the Government concedes that the relief it demands would have injurious impact on bottlers, would result in restructuring of the industry (creating a "new marketplace environment") and would create conflicts of interest between large bottlers on the one hand and small bottlers on the other.

[20] At the time of the printing of this petition no decision had been entered on complaint counsel's similar motion in the *Pepsi* case.

[21] Order Denying Motion for Partial Summary Decision, FTC Dkt. No. 8855 at 4.

[22] 13a (majority), 21a (dissent).

[23] 7a-8a (majority), 24a (dissent).

heard in opposition" to the complaint.[24] The panel below differed only on the way in which those "fundamental rights to be heard" should be provided.

Even on this issue there was a measure of accord. Both majority and dissent agreed that if this were a civil proceeding involving only private rights, the bottlers would have to be joined as indispensable parties.[25] The conflict between the two opinions thus turns on the narrow legal question of whether a lesser standard of due process should apply where a government agency is the plaintiff.

The majority (Friendly, C.J. and Anderson, J.) answered this question in the affirmative, holding that the public interest in enforcing the antitrust laws is so overriding that an opportunity to intervene may be substituted for the right to service of process and the status of a party which would otherwise be required by the Fifth Amendment.[26]

The dissent (Medina, J.) deplored the majority's substitute for the Fifth Amendment as judicial "corner-cutting" and called for joinder of bottlers " * * * as a matter of sound judicial administration, as a matter of consitutional law and as a matter of plain common sense." [27]

The Majority's Assumptions

In embracing intervention as a substitute for joinder, the majority assumed first, that all bottlers have had or will have some notice of the FTC's claims even though they have never been served with process and second, that intervention would give bottlers more or less all the rights of parties.

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[24] 18a (majority), 25a-26a (dissent).

[25] 6a-7a, 18a n.13 (majority), 27a-30a (dissent).

[26] 7a-8a, 14a.

[27] 28a, 20a.

The record is devoid of factual support for the first assumption.[28]

The second assumption was based only on an a priori extrapolation from the agency's Rules of Practice. Although the Rules do not give intervenors rights to make motions or argue orally, the majority concluded that this was no problem since "[w]e * * * have no cause to think that, * * * the Examiner would prevent them from doing so."[29] A "more serious question" was posed by the fact that the Rules are "ambiguous on whether an intervenor is a party" and whether he could "appeal to the Commission from the Examiner's initial decision."[30] The majority answered this by simply admonishing the Commission that it "would withhold such a right at its peril in a case such as this where the intervenors are persons whose contract rights are at stake."[31]

Having thus placed an unwarranted gloss on the agency's Rules of Practice, the majority next resolved the matter of judicial review by concluding that the right of "intervenors" to appeal to a court of appeals from a cease and desist order, although "somewhat less clear" than Pep-

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[28] In making this assumption, the majority apparently relied entirely on the fact that "[a]ll but one [bottler] are members of the Bottlers' Association, and Bottler No. 513 would have to possess a naiveté not normally encountered in business affairs not to be aware of this proceeding which has been so extensively publicized *and so vitally affects the structure of the industry* * * *." 8a n.5 (emphasis added).

[29] 7a.

[30] 7a; *but see* 7a n.3, where the court below pointed out that the Examiner has stated that "intervenors would *not* be parties" and would have to "seek leave" from the Commission to intervene on appeal (emphasis added).

[31] 7a-8a; in a footnote, the court below went on to suggest that all agencies "could well consider revision of their rules on intervention" to conform to the conclusions reached by it. 8a n.4.

siCo's, "is clear enough".[33] If PepsiCo appealed an adverse decision, the "bottlers" would have an effective right of appeal since "a court of appeals would surely allow the bottlers to intervene."[34] If PepsiCo did not appeal, the bottlers would have some kind of right to judicial review under the APA, which provides for district court review by persons "adversely affected or aggrieved by agency action * * *", "although", Judge Friendly conceded, "courts have not always appreciated this."[34]

Finally, the majority dismissed PepsiCo's risk of multiple litigation as "supposititious", since an FTC order would "bind" all bottlers who (by intervention) have an opportunity to be heard.[35]

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[32] 10a; although in one sentence the court below referred to appeals by "intervenors", the remainder of its dissertation dealt with rights to appeal of "bottlers"—"whether or not they had been full-fledged parties before the FTC"; it is not clear whether the distinction between intervenors and bottlers (most of whom are not intervenors) was inadvertent.

[33] 10a.

[34] 10a, *citing* 5 U.S.C. § 702.

[35] 17a-18a.

The Dissent's Response

The dissent took issue both with the initial premise that intervenors' rights to be heard would be adequately protected and with the ultimate conclusion that non-intervenors could constitutionally be bound. Judge Medina found the premise to be contrary to the plain meaning of the Examiner's order and inconsistent with the FTC's rules:

> "The rulings of the Commission relative to intervention are in my opinion inadequate and illusory. That the rights of those permitted to intervene are limited is apparent on the face of the order * * *. We can read, and the order does not provide for 'full participation.' Those permitted to intervene do not have the right to make motions or argue orally as guaranteed to parties * * *. FTC rules only permit a party to appeal an initial decision * * * and, as noted by Judge Cannella, these intervenors have no right of judicial review. It is, I think, no answer to say that an Appellate Court will probably permit them, on motion, to intervene. In these days of congested calendars some Appellate Courts are not always so accommodating." [36]

The dissent found the conclusion that non-intervenors could be bound because they had an opportunity to intervene to be unconstitutional. The point that could not be "swept under the rug" [37] was that the bottlers were not actually or constructively before the FTC:

> "The lack of notice to the bottlers and the failure to provide them with an effective hearing raise consti-

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[36] 24a.

[37] 25a.

> tutional questions. * * * The plain fact is that no formal notice of any kind has been given by the FTC to PepsiCo's 513 bottlers. * * * It is strange doctrine to me that constitutional requirements of notice and a fair hearing are complied with if the persons entitled to notice are members of a trade association that has moved to intervene in the proceeding. * * * "[38]

The Association's presence in the proceedings was of no significance with respect to the rights of individual bottlers because the interests of many of the bottlers were "adverse to one another."[39]

If there could be any doubt about the merits of the indispensable party argument, the Metro Handicap made it "impregnable":[40]

> "The 'Metro' provision goes much further than an order compelling PepsiCo to 'cease and desist' from enforcement of certain features of the contracts with the bottlers. The 'Metro' clause not only voids some of the contractual rights of the absent parties but imposes new obligations upon the parties to these contracts. * * * Thus it is proposed that by agency action new contracts be created and imposed upon an entire industry, although the interested parties are not represented in the adjudicatory process."[41]

The question which this Court is asked to consider is whether an agency should be permitted to proceed to take

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[38] 25a-26a (footnote omitted).

[39] 26a.

[40] 25a.

[41] 25a.

action to restructure an industry when there is no impediment to joining the interested parties.

REASONS FOR GRANTING THE WRIT

I.

Whether Minimal Due Process Requirements For Entering Judgments, Mandatory Or Otherwise, Which Are Binding In Personam Should Be Relaxed Simply Because A Government Agency, Rather Than A Private Litigant, Brings Suit To Enforce A Regulatory Statute Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

The court below recognized that were the FTC proceeding a suit between private parties, all bottlers subject to the Commission's process would have to be joined before the suit could proceed. 6a-7a, 18a n.13. *See also Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 116-25 (1968); *Western Union Tel. Co.* v. *Pennsylvania,* 368 U.S. 71 (1961); *Gregory* v. *Stetson,* 133 U.S. 579 (1890); *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1854); Fed. R. Civ. P. 19(a).

The court below reasoned that a less exacting standard of procedural due process is permissible when contract rights are adjudicated by a federal regulatory agency which has found that joinder would be difficult, but not that it would be impossible. That rationale has never previously been applied by this Court.

The court below cited no compelling governmental interest which could justify the non-joinder of bottlers over whom the FTC has jurisdiction. This Court has not yet decided that the federal government is free to disregard the property rights of private persons merely because

recognition of those rights might complicate administrative proceedings.[42]

The cases relied on by the court below do not support any such novel and far-reaching principle. In *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), for example, the question of joining indispensable parties was neither raised nor discussed.[43] In *Schwinn* and in the other antitrust cases cited[44] there had been no finding, as there has been by the Examiner in this case, that "substantial property rights" of the absent parties to a contract could be destroyed by an adverse decision. In at least one of these cases[45] the license involved was terminable at will. In another[46] the absent parties were foreign nationals immune to the process of a United States court, and for that reason were not indispensable to the adjudication of the issues.[47]

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[42] For the reasons indicated on Point III, *infra*, compliance by the Commission with the Second Circuit's statements concerning intervention and appeals by bottlers could ultimately make disposition of the proceedings far more difficult than if all bottlers were joined as parties at the outset.

[43] This issue was also neither raised nor discussed in United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), or United States v. Univis Lens Co., 316 U.S. 241 (1942).

[44] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[45] Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).

[46] United States v. National Lead Co., 63 F. Supp. 513 (S.D. N.Y. 1945), *aff'd*, 332 U.S. 319 (1947).

[47] As Judge Rifkind explained in *National Lead:*

> "Were the rule advocated by [a United States defendant] allowed to operate in the field of restraints upon the foreign commerce of the United States, it would paralyze the enforcement of the law in all cases where one or more of the parties to the conspiracy was an alien corporation over whom the court could acquire no personal jurisdiction. • • •" (63 F. Supp. at 525 n.8).

In no antitrust case has it been held that absent persons did not have to be joined in any, let alone all, of the circumstances that exist in this case: where (1) there has been a finding that substantial property rights of the bottlers are involved; (2) there has been no finding that joinder of the bottlers would be impossible; (3) the legality of the challenged provisions may ultimately turn on their effects on individual bottlers in their particular marketing areas;[48] and (4) the relief sought in the proceeding would impose mandatory obligations on the bottlers.

As Judge Medina correctly noted in the court below, the impact of the Commission's proceeding to restructure the soft drink industry "goes much further than an order compelling PepsiCo to 'cease and desist' from enforcement of certain features of the contracts with the bottlers."[49] Under the Metro Area Bottler Handicap the larger bottlers would not only lose their exclusive rights to a particular territory but would be placed under a *mandatory* obligation not to sell soft drinks in certain areas of the country or even to sell to customers who would ship into those areas.

It is clear from the recent decision of this Court in *United States* v. *Glaxo Group Ltd.*, 93 S.Ct. 861 (1973), that no such "mandatory" obligation can be imposed without joinder of the bottlers. In *Glaxo*, this Court held compul-

[48] The Examiner, in denying complaint counsel's motion for partial summary decision, has ruled that the case cannot be decided on a per se basis, and that evidence with respect to individual bottlers is essential in determining the legality of the restrictions. Order Denying Motion for Partial Summary Decision, FTC Dkt. No. 8855 at 3-4. This conclusion is clearly correct. *See* Albrecht v. Herald Co., 390 U.S. 145, 155-56 (1968) (Douglas, J., concurring); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 385-89 (1967) (Stewart, J., concurring and dissenting); United States v. Hearst Corp., 1972 Trade Cas. ¶ 74,161 (S.D.N.Y. 1972).

[49] 25a n.1.

sory licensing of a patent to be necessary because, *inter alia*, non-party licensees could not be forced to abide by the terms of an order directed against the patentee:

> "• • • The licensees, of course, are not parties to this action, and a mandatory-sales order would not affect them. • • •" (93 S.Ct. at 868).

Non-party trademark licensees, such as the bottlers involved herein, can be subjected to no different standards of due process than the non-party patent licensees in *Glaxo*; obviously the decision of the court below, rendered before this Court's decision in *Glaxo*, was in error in its conclusion that the absent bottlers would be bound by the results of the FTC proceeding.

The Commission proceedings to restructure the bottling industry are significantly different from those involved in the "public rights" cases principally relied on by the court below, *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), and *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938). The absent parties in those cases were not required to assume any new obligations as the result of the agency's order. There was no finding in those cases, as there has been by the Examiner in this case, that absent persons' "substantial property rights" and economic interests would be affected by an order adverse to the named respondent. Indeed, in the *National Licorice* case none of the absent employees came forward to argue that the order "affects his contractual rights or casts a cloud on them." (309 U.S. at 370 (separate opinion of Justices Douglas and Black)).

The opinion of the court below extends far beyond this Court's holding in either *National Licorice* or *Consolidated Edison*. The court below held that the bottlers could be bound in personam by an order affecting their property rights. In *Consolidated Edison* and *National Licorice*, how-

ever, this Court held that the absent parties (a labor union and individual employees, respectively) were not indispensable parties and did not have to be joined precisely because the orders directed against an employer had not impaired their contract rights. *National Licorice Co.* v. *NLRB*, 309 U.S. at 365-66, 369-70 (separate opinion of Justices Douglas and Black); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. at 233-38.

Unlike the bottlers, moreover, the absent parties in *National Licorice* could not have been joined as parties in the administrative proceedings. The jurisdictional statute, Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), empowered the Board to serve complaints only upon a person who "has engaged in or is engaging in" an unfair labor practice. The Board did not contend that the employees in *National Licorice* had participated in unfair labor practices; the theory of the complaint was that they had been victims of unfair labor practices rather than perpetrators. The "public rights" sought to be vindicated by the Board were the very rights granted to the employees by the National Labor Relations Act.

No similar constraints prevent the Commission from joining the bottlers. The bottlers are all located within the United States and are thus subject to the Commission's process. If the Commission can serve a complaint on PepsiCo because it has "reason to believe" that PepsiCo is using an unfair method of competition by granting exclusive territories to its bottlers,[59] a fortiori it can serve a complaint on the bottlers who have complied with their contracts.

In effect, this Court held in *Consolidated Edison* and *National Licorice* that the absent persons were no more

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[59] *See* Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b).

than conditionally necessary parties—parties who could not be joined in the agency proceedings but whose property rights were not so inextricably intertwined with the relief sought that the proceedings could not go forward in their absence. *See* Fed. R. Civ. P. 19(b). This Court has never decided, however, that agency proceedings may go forward in the absence of conditionally necessary parties who *can* be joined as parties. *See* Fed. R. Civ. P. 19(a). Nor has this Court decided that a person whose property rights are threatened in agency proceedings is nothing more than a conditionally necessary party. The court below, however, incorrectly decided not only that the Commission's proceeding to restructure the soft drink industry could proceed in the absence of indispensable parties who could be joined, but also that the indispensable parties would be bound in personam by the result of that proceeding.

II.

Whether Intervention And Some Right Of Appeal Can Serve As Substitutes For Joinder Of Indispensable Parties Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

A. *Voluntary Intervention Is Not A Substitute For Joinder.*

An unexercised right to intervene voluntarily in private litigation has never been considered the equivalent, for purposes of *res judicata*, of having been made a party. *Chase National Bank* v. *City of Norwalk*, 291 U.S. 431 (1934); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105 (1918). Prior to the decision of the court below, no court had ever suggested that the possibility of intervening as a defendant could serve as a substitute for joinder in agency adjudications.

The perniciousness of any such doctrine clearly appears from the record in this case. The right to intervene before an agency such as the Federal Trade Commission is an equivocal and uncertain right when the agency has no rules permitting intervention as of right or defining the scope of intervenors' participatory rights. *See* Federal Trade Commission Rules of Practice § 3.41(c), 16 C.F.R. § 3.41(c) (1972). There is no assurance (the assumptions of the majority below notwithstanding) that intervenors before the FTC will be granted the same fundamental procedural rights they would have as parties, such as the right to appeal rulings by the Examiner to the full Commission, a right which the FTC rules accord only to parties. Federal Trade Commission Rules of Practice § 3.52(a), 16 C.F.R. § 3.52(a) (1972).

The vice of relying on absent parties to intervene to protect their interests is compounded in this case because the bottlers have been afforded no notice of the FTC proceeding in the constitutional sense. The Commission has never taken a single step formally to apprise the bottlers of their "right" to intervene or of the existence of the proceeding in which that "right" purportedly exists. Adequate notice presupposes something more than a suspicion that the proceedings may have been reported to the bottlers by the named respondent, an intervening party[51] or the industry press. *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928).

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[51] The Association, of course, did not intervene as a class representative, and it could scarcely serve in that capacity in light of the "Handicap" and the conflicts of interest which that provision has created among the Association's membership. Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Hansberry v. Lee, 311 U.S. 32 (1940).

As this Court stated in *Walker* v. *City of Hutchinson*:

> "There is nothing peculiar about litigation between the Government and its citizens that should deprive thoes citizens of a right to be heard. * * *" (352 U.S. at 117).

The bottlers have had *no* right to be heard in a proceeding before an agency which not only refuses to make them parties but even begrudges them "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. at 314.

B. *The Bottlers' So-Called Right of Appeal Is Not a Substitute for Joinder.*

The attenuated right of appeal postulated for bottlers by the court below should not affect the Commission's obligation to join the bottlers Any right that bottlers might have to review, whether by intervening in an appeal by PepsiCo or by filing suit in a district court under the Administrative Procedure Act in the event that PepsiCo does not appeal, cannot be considered the equivalent of the right to appeal from a proceeding in which bottlers have been parties from the beginning. The effectiveness of judicial review, either on direct review or under § 10(e) of the APA (now 5 U.S.C. § 706), hinges on the record developed in the administrative proceedings. There is no guarantee that the bottlers will have a fair or meaningful opportunity to participate in the creation of that record unless they are joined as parties.

III.

The Holding Below, Giving All Absent Bottlers Rights To Intervene And/Or Separate Rights Of Review As "Aggrieved Persons", Would Paralyze The Judicial System Without Any Compensating Benefits To The Administrative Process.

The court below reasoned that a binding judgment depriving absent persons of property rights can be entered in any agency proceeding as long as the absent persons possess both a right to intervene and a right to appeal. As demonstrated in Points I and II, *supra,* this rationale is so palpably incorrect and entails such potential for abuse that this Court should grant certiorari solely to repudiate it. But even if this Court were not convinced of the enormity of this error, it should grant the petition in order to consider whether the lower court's substitution of a right of appeal for the right of joinder might not have a paralyzing effect on judicial review of administrative agency action.

Under the Federal Trade Commission Act and the statutes of most federal agencies, named respondents can appeal as of right *only* to a single court of appeals. *See* Federal Trade Commission Act § 5(d), 15 U.S.C. § 45(d). The court below, however, has extended to every bottler (as an aggrieved person under 5 U.S.C. § 702) a separate right to review FTC orders, presumably in whatever district court he chooses. The burdens which would be imposed on the judicial system by this substitute for due process more than offset any theoretical gain in efficiency that might result from proceeding without the bottlers.

Moreover, under the decision of the court below, there are *no* administrative gains to be realized, even in the

short run, from failing to join absent persons who have been found to be indispensable parties; under that decision all such persons must be permitted to intervene with substantially all the rights they would have, had they been joined as parties initially.[52] If 513 *Pepsi-Cola* bottlers may freely intervene and participate in the FTC hearings, as the court below decreed, management of those hearings would be no more difficult than if those 513 bottlers had been joined as parties respondent.

Perhaps the court below was gambling that, either through inertia or ignorance of the consequences, bottlers would not intervene in such numbers. Due process, however, should not turn on whether small businessmen are sufficiently aware of the intricacies of complex antitrust proceedings to determine that they must intervene in them in order to protect their property rights.

The only efficient method of assuring that the bottlers will be accorded due process and that those proceedings will ultimately result in one final judgment is to require that the indispensable absent bottlers be joined as parties.

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[52] "* * * [A] proceeding conducted under such restriction [those that could be permissibly placed on bottlers joined as respondents] would not differ essentially from what can be accomplished through intervention * * *." 18a (majority opinion).

IV.

Delay In Making A Final Determination Of The Threshold Question Of "Who Are The Proper Defendants" Would Be Contrary To The Public Interest.

The decisions of this Court establish that early judicial review is appropriate, and indeed manifestly in the public interest, on fundamental issues of subject matter jurisdiction and due process of law which could obviate futile or unjust administrative proceedings. *E.g., Parisi* v. *Davidson*, 405 U.S. 34, 37-38 (1972); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285 (1922). The question whether bottlers must be joined before they can be bound by an order in the FTC proceeding is such an issue.

In the absence of immediate review by this Court, years of litigation before the FTC could result in yet another "20th-century sequel to *Bleak House*", *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 93 S.Ct. 647 at 663 (1973) (Burger, C.J., dissenting)—a final cease and desist order which proves not to be final at all but is subsequently ruled a nullity because of the FTC's failure to join the bottlers or which is held not to bind some or all bottlers.

Courts in other circuits may disagree with the decision of the court below and permit the absent bottlers to litigate *de novo* the issues which the FTC seeks to resolve.[53] A failure to resolve this issue now, at the threshold of the litigation, could involve the same unnecessary investment of "untold efforts and vast expense" as was involved in the

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[53] *See, e.g.*, Coca-Cola Co. v. FTC, 1973 Trade Cas. ¶ 74,360 at 93,678 (5th Cir. 1973): "* * * If plaintiffs eventually prevail on review of the final order and it is necessary to begin anew with Commission proceedings, it will not be the first time events [have] taken that course. * * *"

TWA case, 93 S. Ct. at 662. Such a result would not only run contrary to public policy for the reasons stated therein, but would also be injurious to the public interest in preserving small businessmen.[54]

A decision by the FTC which purports to abrogate bottlers' contract rights could, without more, precipitate a de facto restructuring of the soft drink industry. Large bottlers, armed with such a ruling (albeit interim and erroneous) could nevertheless take marketing actions which would destroy neighboring small bottlers. A subsequent decision holding that the FTC decree is a nullity or is not binding on absent bottlers would be a cruel irony to the bottlers most adversely affected by the FTC proceeding. Where this kind of threshold question arises in a case involving an entire industry and affects the property rights of more than 2700 independent businessmen, the issue is clearly one of national significance, and its prompt resolution is required in the public interest.

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[54] "* * * Throughout the history of these [antitrust] statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other. * * *" United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.).

CONCLUSION

The opinion of the court below is at odds with the most basic requirements of procedural due process established by the decisions of this Court. The question whether, for its own supposed convenience, an administrative agency can be allowed to rewrite the contracts of absent persons and impose new obligations upon them is one of national importance. The petition for a writ of certiorari should accordingly be granted.

Respectfully submitted,

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Pepsi-Cola Bottling Company
of Corvallis, Inc.

Of Counsel:

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HUGHES HUBBARD & REED

April 18, 1973.

APPENDIX A

(Opinion of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 294, 295—September Term, 1972.

(Argued October 12, 1972 Decided November 20, 1972.)

Docket Nos. 72-1911
72-1912

PEPSICO, INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION; MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC.,

Plaintiff-Intervenor-Appellant,

v.

FEDERAL TRADE COMMISSION; MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

Appendix A

Before:

FRIENDLY, *Chief Judge,*
MEDINA and ANDERSON, *Circuit Judges.*

Appeals from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge,* 343 F. Supp. 396 (1972), dismissing the complaint in an action by PepsiCo, Inc., in which a Pepsi-Cola bottler had intervened as plaintiff, to enjoin the Federal Trade Commission from continuing to conduct a proceeding which challenged the validity of the geographical exclusivity provisions of PepsiCo's contracts with bottlers unless all such bottlers were joined as respondents.

Affirmed.

MILTON HANDLER, Esq., New York, N. Y. (Kaye, Scholer, Fierman, Hays & Handler, and Fred A. Freund, Esq., Elizabeth Head, Esq., Herbert Schreiber, Esq., and Robert A. Burka, New York, N. Y., of Counsel), *for Plaintiff-Appellant.*

ROBERT J. SISK, Esq., New York, N. Y. (Hughes Hubbard & Reed, and James B. Kobak, Jr., Esq., New York, N. Y., of Counsel), *for Plaintiff-Intervenor-Appellant.*

FRANK H. WOHL, Esq., Assistant United States Attorney (Whitney North Seymour, Jr., Esq., United States Attorney for the Southern District of New York, and T. Gorman Reilly, Assistant United States Attorney, of Counsel), *for Defendants-Appellees,*

—and—

Appendix A

(Harold D. Rhynedance, Jr., Esq., and James P. Timony, of Counsel), *for Defendant-Appellee, the Federal Trade Commission.*

FRIENDLY, *Chief Judge:*

On July 15, 1971, the Federal Trade Commission (FTC) filed a complaint against PepsiCo, Inc. under § 5 of the Federal Trade Commission Act.[1] The essential allegation was that PepsiCo had "hindered . . . competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area." Annexed to the complaint was a form of order which the FTC proposed to issue if the evidence warranted. The order would prohibit PepsiCo, among other things, from entering into, continuing, enforcing, or renewing any contract that would limit the territory in the United States wherein bottlers might sell, or from refusing to sell to any bottler because of the territory wherein he sold. Also annexed was a letter which PepsiCo would be directed to send its bottlers within 60 days after issuance of the proposed order. PepsiCo's answer, dated August 23, 1971, included "as a complete defense" an allegation "that the complaint herein is fatally defective in that it fails to join as parties respondent persons needed for a just adjudication, to wit the soft drink bottlers who have entered into the challenged agreements . . . and made substantial investments in plant, manufacturing and distribution facilities in reliance thereon and upon the terri-

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1 A summary of the complaint was unofficially published in 3 Trade Reg. Rep. ¶¶ 19,443, 19,740. Similar complaints were filed against six other manufacturers of soft drink syrups: Dr. Pepper Co.; The Seven-Up Co.; Royal Crown Cola Co.; and the Coca-Cola, Cott and Crush groups.

torial security afforded them thereunder, and ignores the property and procedural rights of these indispensable parties whose economic interests would be most directly and adversely affected by the proposed order accompanying the complaint."

Meanwhile the Pepsi-Cola bottlers had not been idle. Two motions to intervene, both dated August 11, 1971 and signed by the same counsel who have represented the intervening plaintiff in this action, Pepsi-Cola Bottling Company of Corvallis, Inc., were submitted to the Hearing Examiner. One of these was on behalf of Pepsi-Cola Albany Bottling Company, Inc., Pepsi-Cola Bottling Company of Central Virginia, and Pepsi-Cola Bottling Company of Tampa. An affidavit supporting the motion set forth the facts concerning the movants' exclusive contracts and alleged that there was no assurance that their interests would be adequately represented by PepsiCo. The other was on behalf of Pepsi-Cola Bottlers' Association. This motion alleged that the Association "effectively represents the interests of all the franchised Pepsi-Cola Bottlers in the United States." A supporting affidavit stated that 512 of the 513 Pepsi bottlers were members of the Association, repeated the allegation that the interests of PepsiCo and the bottlers were not identical, denied that the franchises had an anti-competitive effect, and contended that, absent the enforcement of territorial exclusivity, "a relatively few, large Bottlers, each serving extensive geographical areas and catering almost exclusively to large retail customers, will drive local Bottlers out of the business." On November 18, 1971, the two motions were granted by the Hearing Examiner whose order is quoted in relevant part below.[2]

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2 It Is Ordered that the applicants, Pepsi-Cola Bottlers' Association; Pepsi-Cola Albany Bottling Company, Inc.; Pepsi-Cola Bottling Company of Central Virginia, and Pepsi-Cola Bottling Company of Tampa, motion to intervene in this matter be granted, including the following:

He characterized his action as "the granting of the right of full participation" which might "aid the examiner and the Commission in properly resolving the issues presented."

During the same period, Pepsico, relying in considerable part on the analogy of F.R.Civ.P. 19, had moved to dismiss the complaint because of the nonjoinder of the 513 Pepsi bottlers. The Hearing Examiner denied the motion, finding that joinder of all the bottlers "would create a completely unmanageable situation for trial purposes" and that his grant of intervention to the Bottlers' Association had not been "on a limited basis."

PepsiCo then sought leave to file an interlocutory appeal to the Commission. The FTC chose instead to treat the question as if it had been certified to it with the Hearing Examiner's recommendation. In an opinion dated March 23, 1972, also dealing with similar motions by the other soft drink syrup manufacturers against which the FTC was proceeding, see fn. 1, the Commision denied the motions to dismiss for failure to join indispensable parties.

Shortly thereafter PepsiCo instituted this action in the District Court for the Southern District of New York to enjoin the FTC from continuing the proceeding unless it joined all the bottlers. The plaintiffs moved for a preliminary injunction, the defendants for dismissal of the

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1. The right to object to questions propounded by counsel in support of the complaint and counsel for respondent.

2. The right to cross-examine witnesses proffered by counsel in support of the complaint or counsel for respondent.

3. The right to offer evidence, both documentary and testimonial, at the conclusion of respondent's defense.

4. The right to object and cross-examine will be granted subject to strict control of the hearing examiner and the right to proffer evidence will be limited to that relevant evidence which is not repetitious of that proffered by counsel in support of the complaint or counsel for respondent.

5. The right to file proposed findings of fact and briefs with the hearing examiner as he orders.

complaint. While these motions were pending, Pepsi-Cola Bottling Company of Corvallis, Inc., an Oregon bottler, moved to intervene as a plaintiff, and this motion was granted. Judge Cannella then granted the defendants' motion to dismiss, 343 F. upp. 396, holding that since review was premature, the court lacked jurisdiction over the subject matter.

These appeals followed and, on appellants' request, were given expedited treatment. We shall deal first with the case as it stood before the FTC and the district court and will later consider the effect of a motion, made after the filing of notices of appeal, by FTC complaint counsel which sought summary judgment with respect to the invalidity of the exclusive territorial clauses and gave notice of counsel's intention to propose a "Metro Area Bottler Handicap" provision as a remedy.

I.

It is desirable to consider at the outset what status the FTC has accorded the bottlers who have intervened and would accord others who might seasonably seek to do so. The governing statute, 15 U.S.C. § 45(b), provides: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person." The FTC's Rules of Practice, 16 C.F.R. § 3.14, state, in relevant part, that "[t]he hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

If this had been a civil action, intervention by the bottlers would have been not a matter of grace but of right, F.R.Civ.P. 24(a), and such an intervenor would have had all the rights of a party subject only to reasonable provisions designed to assure against repetitious evidence and

argument. We see no reason why a different principle should prevail before administrative agencies, except that the scope of the proceeding and the consequent possibilities of delay may make it reasonable to undertake more vigorous policing against dilatory tactics than would ordinarily be necessary in the courts. Indeed, we think the Supreme Court has held precisely this. *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 231-39 (1938); *FCC* v. *National Broadcasting Co., Inc., (KOA)*, 319 U.S. 239 (1943).

There is no reason to believe that the status accorded the four intervenors was anything less than is required. Although the appellants have made much of the fact that the Hearing Examiner's order granting leave to intervene provides for only five particular rights, see fn. 2, the specific inclusion of these rights does not imply an exclusion of all others. We therefore have no cause to think that, if the intervenors wished to make motions or argue orally, the Examiner would prevent them from doing so. A more serious question is whether they could appeal to the Commission from the Examiner's initial decision. Rule 3.52(a), 16 C.F.R. § 3.52(a), limits this right to parties, and Rule 3.41(c), 16 C.F.R. § 3.41(c), is ambiguous on whether an intervenor is a party.[3] Contrast the FCC's Rules of Practice, 47 C.F.R. §§ 1.223, 1.302. However, in light of the Supreme Court decisions cited, the Commission would withhold such a right at its peril in a case such as this where the intervenors are persons whose contract rights are at

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3 The opinions of the Hearing Examiner denying the motion to dismiss the complaint for nonjoiner of indispensable parties and granting intervention indicated that the intervenors would not be parties. In addition, the Examiner stated at a prehearing conference that, if the intervenors wished to appeal his initial decision, they should seek leave to intervene from the Commission.

stake.[4] Furthermore, we do not construe anything the Commission has done as preventing further intervention; the Examiner announced at a prehearing conference that, if other bottlers wished to intervene, "they will be most welcome by me."[5]

We thus predicate our discussion on the basis that, subject to reasonable limitations to avoid repetition and delay, the four intervenors and other bottlers who may reasonably apply will receive from the FTC all those rights "provided by law" that are essential to a fair hearing. 16 C.F.R. § 3.14.

II.

Although the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by order of the Commission to cease

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4 Agencies could well consider revision of their rules on intervention to distinguish between persons whose property rights are at stake and are thus entitled to all the rights of a party, and persons with a more generalized interest, a sort of super *amici curiae*, whose participation can well be restricted to avoid undue prolongation of the hearing. See generally, MacIntyre & Volhard, Intervention in Agency Adjudications, 58 Va. L. Rev. 230 (1972). For rules making such a distinction, see 14 C.F.R. §§ 302.14(b), 302.15 (Civil Aeronautics Board). See also 47 C.F.R. §§ 1.223, 1.225 (Federal Communications Commission).

5 The FTC might consider revision of its rules to provide for publication of its complaints in the Federal Register whenever the complaint seeks to invalidate provisions of contracts between the respondent and others. Compare the FCC's Rules, 47 C.F.R. §§ 1.221, 1.223. This may well be required by *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U.S. at 233-34, and, indeed, by § 5(a) of the APA, now 5 U.S.C. § 554(a). But it is not here contended that the Pepsi bottlers have not in fact received notice. All but one are members of the Bottlers' Association, and Bottler No. 513 would have to possess a naiveté not normally encountered in business affairs not to be aware of this proceeding which has been so extensively publicized and so vitally affects the structure of the industry—if, indeed, PepsiCo has not itself notified him. The absence of formal notice thus does not require an injunction, *cf. United States* v. *Aarons*, 310 F.2d 341 (2 Cir. 1962), although as indicated it would be preferable if the FTC were to provide this in cases like the present.

and desist," 15 U.S.C. § 45(c), we agree with appellants that the fact that the order here assailed is not one requiring PepsiCo to cease and desist from anything does not lead inexorably to the conclusion that it is not reviewable, but only that it is not reviewable by petition to a court of appeals. *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F.2d 342, 344 (D.C. Cir. 1965). Whether it was reviewable by suit in a district court depends on the construction given to the first two sentences of § 10(c) of the APA, now 5 U.S.C. § 704:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review of the final agency action.

Since the order was not one "made reviewable by statute," its reviewability hinges on whether it constitutes "final agency action for which there is no other adequate remedy in a court . . . ."

If the APA uses the term "final agency action" in the same sense that the Judicial Code speaks of a "final decision" of a lower court, 28 U.S.C. § 1291, there could be little doubt about the answer. It is clear that "[d]enial of a motion to dismiss is not a final order and is therefore not appealable," 2A Moore, Federal Practice ¶ 12.14, at 2338 & n. 16 (2d ed. 1968), and this principle has been applied to a refusal to dismiss for failure to join indispensable parties. *Ritter* v. *Wyoga Gas & Oil Corp.*, 110 F.2d 524 (3 Cir.), *cert. denied*, 311 U.S. 669 (1940). Many of the considerations supporting the final judgment rule with respect to appeals from decisions of lower courts are equally present in the case of agency action: The agency

may find in favor of the respondent; the case may be settled; the reviewing court, in any event, will be in a better position to assess the matter when all the cards have been played. There can be no question that, under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(c), PepsiCo can obtain review by a court of appeals of any cease and desist order that may emanate from the proceeding. The right of the intervenors to obtain judicial review of a cease and desist order, although somewhat less clear, is clear enough. The problem arises from the fact that, as indicated, the Federal Trade Commission Act limits review by a court of appeals to "any person, partnership, or corporation required by order of the Commission to cease and desist," etc., and any order in this proceeding would presumably run only against PepsiCo. However, if PepsiCo sought review, a court of appeals would surely allow the bottlers to intervene. FRAP 15(d). If PepsiCo did not appeal, review would be available to the bottlers in a district court, whether or not they had been full-fledged parties before the FTC, since they would be "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. The notion that being a "party" before an agency either automatically confers or is a necessary condition of the right to judicial review has in fact been dead since *Pittsburg & W. Va. Ry.* v. *United States*, 281 U.S. 479, 486 (1930), see 3 Davis, Administrative Law Treatise § 22.08, at 241-43 (1958), although courts have not always appreciated this. The provisions of § 10(a) of the APA, now 5 U.S.C. § 702, should have dispelled any lingering doubt generated by earlier Supreme Court pronouncements.

The legislative history of the APA sheds little light on what the framers meant by "final agency action for which there is no other adequate remedy in a court." S. Rep. No. 752, 79th Cong., 1st Sess. 27 (1945), says that the

phrase "includes any effective agency action for which there is no other adequate remedy in any court." H.R. No. 1980, 79th Cong., 2d Sess. 43 (1946) speaks of "any effective or operative agency action." The adjectives tend against a construction that would include denial of a motion to dismiss a complaint. A quick reading of the second sentence of § 10(c) might suggest that interlocutory rulings were never to be reviewed until there had been final agency action in the usual sense. However, the phrase "[a] preliminary, procedural, or intermediate agency action *not directly reviewable*" (emphasis supplied) suggests that some action may be directly reviewed, although it does not explain by what authority unless the reference is to special statutory review procedures. Perhaps the second sentence could best be read as designed to insure that, like similar orders in civil actions, see 9 Moore, Federal Practice ¶ 110.07, at 108-09 (2d ed. 1972), preliminary orders in administrative proceedings which are not immediately reviewable do not remain beyond review forever. *Cf.* 3 Davis, Administrative Law Treatise § 20.08, at 101 (1958). It is arguable also that the framers must have been familiar with the well-known decision in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) and that, if they intended to overrule it, they would have spoken more clearly.[6] The decisions on the subject, both by the Supreme Court and by lower courts, are conflicting, as Professor Davis has pointed out, 3 Administrative Law Treatise §§ 20.01-.05 (1958). Moreover, most of them do

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6 Attorney General Clark and Representative Walter, sponsor of the House bill, indicated that § 10(c) was intended to enact existing law, S. Doc. No. 248, 79th Cong., 2d Sess. 230, 369 (1946), and the Attorney General's Manual on the Administrative Procedure Act 103 (1947) suggests that § 10(c) enacted the *Myers* rule.

not address themselves to what one would suppose to be the crucial issue, *i.e.*, the proper interpretation of § 10(c).[7]

We find no need to proffer a definitive solution to the question of the reviewability of agency orders which are not "final" in the ordinary sense—something which, in any event, is beyond the capability of an inferior court. Rather we shall accept for the sake of argument, despite possible contrary implications from the per curiam in *FPC* v. *Arkansas Power & Light Co.*, 330 U.S. 802 (1947), *rev'g* 156 F.2d 821 (D.C. Cir. 1946), see also *Bristol-Myers Company* v. *FTC*, —— F.2d —— (2 Cir. 1972), slip opinions 449, that we can extrapolate from cases such as *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), a principle that one can find "final agency action for which there is no other adequate remedy in a court" if an agency refuses to dismiss a proceeding that is plainly beyond its jurisdiction as a matter of law or is being conducted in a manner that cannot result in a valid order.[8] The injury against which a court would

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7 The courts instead speak of "exhaustion." This case shows how little help that term offers in the context here relevant. If the rule is simply that plaintiff must have "exhausted" administrative remedies with respect to the issue for which judicial review is sought, as he clearly must, PepsiCo has done that. The real question is under what circumstances a court should review an order which, in Mr. Justice Brandeis' famous phrase, "does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." *United States* v. *Los Angeles & S. L. R.R.*, 273 U.S. 299, 309-10 (1927). See the discussion in Jaffe, Judicial Control of Administrative Action 398-410 (1965). Compare also *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U.S. 158 (1967); *Gardner* v. *Toilet Goods Ass'n, Inc.*, 387 U.S. 167 (1967).

8 PepsiCo argues this to be the real thrust of *Interstate Broadcasting Co.* v. *United States*, 286 F.2d 539 (D.C. Cir. 1960), and *American Communications Ass'n* v. *United States*, 298 F.2d 648 (2 Cir. 1962), holding

protect is not merely the expense to the plaintiff of defending in the administrative proceeding, which *Myers* held not to be enough, 303 U.S. at 51-52, but, in a case like this, the enormous waste of governmental resources and the continuing threat of a complete restructuring of an industry. While PepsiCo and its bottlers cannot be heard to complain of the Commission's attempt to accomplish this restructuring, arguably they should not be placed under that threat in a proceeding that must prove to be a nullity.

III.

We are unable to conclude, however, that appellants have brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward. PepsiCo say that, unless all the bottlers are joined, its compliance with an eventual cease and desist order, after full judicial review, might subject it to liability in a suit by an unjoined bottler whose territory had been invaded by another to whom PepsiCo had sold syrup. Pepsi-Cola Bottling Company of Corvallis says that, if a cease and desist order is issued, it might be held liable if it then sought to sell in territory now granted to an unjoined bottler.[9] They contend that Congress could not have

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orders denying intervention in administrative proceedings to be immediately appealable in circumstances where erroneous denial might invalidate any future order, although the decisions are technically distinguishable since the precise issue was whether the orders fell within the statute permitting review of "final" FCC orders, now 28 U.S.C. § 2342. See also *Public Service Comm'n* v. *FPC*, 284 F.2d 200 (D.C. Cir. 1960); *Lynchburg Gas Co.* v. *FPC*, 284 F.2d 756 (3 Cir. 1960); *City of Houston* v. *CAB*, 317 F.2d 158 (D.C. Cir. 1963).

9 Counsel for Pepsi-Cola of Corvallis seeks to explain its own failure to intervene by arguing that, if it did, it would be the only Oregon bottler bound by a cease and desist order. Putting aside the point that the same counsel apparently entertained no such fear when moving for intervention on behalf of three other bottlers, we think, for reasons

meant to allow the FTC to inflict such hardship when joinder of all the bottlers provides a means for avoiding it.

The proposition that a court would hold one person liable to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." *Consolidated Edison Co.* v. *NLRB, supra,* 305 U.S. at 234. The astonishment becomes greater in light of the Supreme Court's clear statement in *National Licorice Co.* v. *NLRB,* 309 U.S. 350, 363 (1940) that, in administrative proceedings devoted "to the protection and enforcement of public rights, there is little scope for the traditional rules governing the joinder of parties in litigation determining private rights," then citing the very case of *Shields* v. *Barrow,* 58 U.S. (17 How.) 129 (1855), on which PepsiCo heavily relies. The Court declared, 309 U.S. at 365, that, despite the nonjoinder of the employees with whom the employer had contracted, "it will not be open to any tribunal to compel the employer to perform the acts, which, even though he has bound himself by contract to do them, would violate the Board's order or be inconsistent with any part of it." [10]

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explained in the text below, that non-intervening bottlers will be effectively bound, and Pepsi-Cola of Corvallis thus need have no hesitancy about intervening in the FTC proceeding if it considers this to be necessary to protect its interests.

10 PepsiCo advances two arguments to detract from the force of this seemingly controlling statement. One is that, in *National Licorice,* over the dissent of two Justices, the Court modified the NLRB order to provide that the notices required to be posted by the employer should include a statement that the invalidation of the contracts was "without prejudice to the assertion by the employees of any legal rights they

Even more to the point, Mr. Justice Stone went on to observe, citing many cases, 309 U.S. at 365-66, that "the order does not go beyond those in suits brought by the United States to restrain violations of the Sherman Act, where the injunction was broad enough to prevent the offender from carrying out contracts with persons not parties to the suits" and that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender" and these "have never been challenged because the holders of the contracts were not made parties."

PepsiCo attempts to dispose of these references to the antitrust and FTC cases by saying that they related to situations where removal of the restrictions sought to be annulled was beneficial to the nonjoined parties. While this may often have been true, it has not always been. In *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930), *aff'g* 34 F.2d 984 (S.D.N.Y. 1929), where the distributors but not the exhibitors were named as defendants,

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may have acquired under such contracts." 309 U.S. at 367. Apparently this was for the purpose of preserving employee rights, such as an irreducible wage scale, vacation with pay, extra compensation for overtime, etc., that had accrued prior to the effective date of invalidation. See Brief for Petitioner at 28. Compare *FTC* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 396 n.3 (1953). The other is the portion of *Consolidated Edison Co.* v. *NLRB*, *supra*, 305 U.S. at 231-39, where the Court invalidated so much of a Board order directing the termination of contracts with independent unions in part because the unions "were entitled to notice and hearing before [the contracts] could be set aside." *Id.* at 233. But the Court was there dealing with a proceeding where the complaint had not challenged the validity of the contracts, and the opinion clearly indicates that, if it had and the unions had been given notice, they would have been "under a duty to intervene before the Board in order to safeguard their interests." *Id.* at 234. Reading *National Licorice* and *Consolidated Edison* together, we think the Court is clearly of the view that, in an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene.

there was evidence that the arbitration provision there annulled was favored by at least a minority of the exhibitors. See 282 U.S. at 43; 34 F.2d at 985, 988-89; Brief for the United States in the Supreme Court at 56. When such an exhibitor sought to defend a contract action by claiming that the distributor-plaintiff had not complied with the arbitration clause, this was refused, *Paramount Famous Lasky Corp.* v. *National Theater Corp.*, 49 F.2d 64 (4 Cir. 1931). Again, in *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436 (1940), an action in which only Ethyl was named a defendant, the Court affirmed an order invalidating provisions in Ethyl's licenses to refiners which required them to sell only to licensed jobbers at a certain price differential above the refiners' best non-premium grade of gasoline, a system which, as the Court found, had the effect of controlling prices to a degree beyond that permitted by Ethyl's patent monopoly. It is rather plain that some of the refiners and jobbers might have regarded the price-fixing as beneficial. We are unable to follow PepsiCo's argument that invalidation of price-fixing agreements is invariably beneficial to a wholesaler or retailer. While it is obvious that a price-fixing agreement with a single distributor operates adversely to the latter, since he would prefer freedom to do as he wishes, it is not at all clear that the more usual case of agreements with all of a manufacturer's competing distributors does; many of them very likely consider it a beneficial protection against price-cutting. Yet it would be news, indeed, that all such distributors must be joined in order for the manufacturer to be protected against subsequent suit. See *United States* v. *National Lead Co.*, 63 F. Supp. 513, 525 n.8 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); *cf. Paramount Lasky Corp.* v. *National Theatre Corp., supra*, 49 F.2d 64. Most pertinently, in *United States* v. *Arnold, Schwinn & Co.*, 388

U.S. 365 (1967), the Court considered the legality of various types of territorial restrictions upon distributors and retailers, although only a distributors' association and B.F. Goodrich & Co. (both a retailer and a distributor), were named as defendants along with the manufacturer.[11]

The upshot of all this is that the fears of PepsiCo and Pepsi-Cola of Corvallis of determinations in private suits inconsistent with a FTC cease and desist order are groundless and that Pepsi-Cola of Corvallis' dilemma whereby, if it intervenes to present its case, it will be bound but non-intervening bottlers will not be, see fn. 9, is of its own making. To be sure, the appellants' position *vis-a-vis* supposititious future private litigation would be more comfortable if they could proffer in bar an order in a proceeding to which every bottler had been made a party than if they were obliged to convince a court of what, on the basis of both authority and reason, we are confident the correct position is. But that is not enough to support a conclusion that any order emanating from the proceeding as now structured would be void—the premise of our assumption that review at this stage may be proper. Since a cease and desist order in a proceeding wherein the bottlers could intervene would in fact bind them, deci-

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11 Other antitrust and FTC cases where the courts have invalidated or approved the invalidation of contract provisions arguably beneficial to the other party despite the failure to join the latter are *United States* v. *Univis Lens Co.*, 316 U.S. 241 (1942) (price-fixing provisions); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944) *(id.)*; *Butterick Co.* v. *FTC*, 4 F.2d 910 (2 Cir.), *cert. denied*, 267 U.S. 602 (1925) (resale price maintenance and exclusive dealing provisions); *Q.R.S. Music Co.* v. *FTC*, 12 F.2d 730 (7 Cir. 1926) *(id.)*; *J.W. Kobi Co.* v. *FTC*, 23 F.2d 41 (2 Cir. 1927) (resale price maintenance provisions). The last three cases were cited with approval in *National Licorice*, 309 U.S. at 366. While it is true that, as urged by PepsiCo's able counsel, the issue of non-joinder was not discussed, we have been cited to no case where a defendant or respondent has been held liable to an unjoined third party for complying with an antitrust decree or an FTC cease and desist order.

sion whether to accede to PepsiCo's request for joinder was within the Commission's discretion. It was entitled to weigh the added comfort which all-out joinder would give PepsiCo against the mountain of paperwork and the delay that would result from joining the 513 Pepsi-Cola bottlers and the bottlers in the six other proceedings, see fn. 1, and also the precedent this would create in cases where even larger numbers were involved.[12] It may be, as PepsiCo urges, that the Commission has exaggerated the burden that joinder would entail. It is by no means certain that all the bottlers would seek to offer evidence; if large numbers did, the FTC could properly impose restrictions that would limit proof to typical situations and avoid repetition. But, apart from the fact that a proceeding conducted under such restrictions would not differ essentially from what can be accomplished through intervention, this is a choice to be made by the agency and not by the courts, so long as the fundamental rights of PepsiCo and the bottlers to be heard in opposition and not to be exposed to liability for complying with any order that may ultimately issue are adequately protected.[13] See *Wolf Corp.* v. *SEC*, 317 F.2d 139, 142-43 (D.C. Cir. 1963). We are convinced they have been.

IV.

Appellants urge that the already bad situation created by the FTC's initial refusal to join all the bottlers has

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12 In *Eastman Kodak Co.* [1952-54 Transfer Binder] Trade Reg. Rep. ¶ 11,527 (FTC 1953), cited by the Commission, there were over 6,000 dealers; in the *Ethyl* case, *supra*, 309 U.S. 436, there were 11,000 jobbers.

13 PepsiCo argues that the bottlers' right to intervene should not affect its right to have indispensable parties joined. Although this would be true in a civil proceeding involving only private rights, the Supreme Court decisions discussed above make it clear that the analogy does not hold in court or agency proceedings to vindicate public rights.

since been altered for the worse by the motion of complaint counsel, filed on or about July 31, 1972, for partial summary judgment and, more particularly, for the inclusion in the order, if found warranted by the evidence, of a Metro Area Bottler Handicap provision. Whereas the order proposed in the complaint would simply have enjoined PepsiCo from enforcing territorial restrictions, the Metro Area Bottler Handicap provision would add a proviso requiring PepsiCo, in the case of the bottlers in the 200 largest locations, to enforce for ten years a new restriction which would prohibit such bottlers from selling elsewhere than in his own territory, the territory of another similarly situated bottler, or unassigned territory. As complaint counsel agued, "the net effect of the provision is to assure that several bottlers can compete effectively for the business in [the largest locations] while temporary protection is afforded small bottlers during the period in which they adjust their plant and marketing efforts to realize economies of scale." This, it is said, creates a clear conflict of interest between Metro Area bottlers which, under the provision would remain subject to certain territorial restrictions, and the smaller bottlers which would not.

It is sufficient to answer that, with respect to this new aspect of the case, there has been no exhaustion of administrative remedies in the meaningful sense of that term, see fn. 7. No effort has been made to convince the FTC that, however matters previously stood, the motion of complaint counsel now calls for joinder of all the bottlers if the Metro Area Handicap is to be imposed. While we could dismiss the point on that ground, we think it better to dispose of it on the merits. Although the Commission might properly choose to reverse its position on joinder in light of the Metro Area Handicap proposal, it is not bound to do so. What it is bound to do is to afford fur-

ther opportunity for intervention by Metro Area bottlers, individually or as a group, since it now appears that the proceeding may have more adverse consequences for them than under the form of order initially proposed.

We thus conclude that even under the perhaps unduly liberal assumption that review would now lie if the proceeding as presently structured could not result in a valid cease and desist order, appellants have not brought themselves within that principle. The order dismissing the complaint is accordingly affirmed.

MEDINA, *Circuit Judge* (dissenting):

I respectfully dissent. I do not think we should leave the question of the subject matter jurisdiction of the District Court up in the air. I believe the District Court had subject matter jurisdiction in this case and that in the exercise of that jurisdiction the District Court on a remand should review the action of the Federal Trade Commission and enjoin it from continuing the PepsiCo proceeding unless and until it provides notice of the issues to all the PepsiCo bottlers and affords them a meaningful right to a hearing. I think this is required as a matter of sound judicial administration, as a matter of constitutional law, and as a matter of plain common sense. In the discussion that follows I shall attempt to demonstrate:

(1) That the District Court had subject matter jurisdiction.

(2) Despite the fact that the threat of suits against PepsiCo, in the event of a final decision that the contracts with the bottlers are illegal, may prove to be illusory, the

provisions made by the Federal Trade Commission for intervention by the bottlers and for the protection of their rights are inadequate. Elementary principles of due process require at the very least notice to all the bottlers of the precise charges of illegality of their contracts with PepsiCo, including the Metro Area Bottler Handicap proposal of complaint counsel. It does not seem to me to make sense to go through this whole weary procedure again if the Commission accedes to complaint counsel's proposal.

(3) As a general rule courts should permit administrative agencies to exercise their expertise in deciding procedural questions affecting the administrative proceeding. Here, however, where constitutional issues of due process are present it is worth noting that the number of bottlers is no obstacle to an effective hearing. Further, the amount of paper work that has gone into this proceeding already, due to the determination of the Commission to deny full party status to the bottlers, far exceeds any necessary amount of procedural rulings and supervision the presence of any number of bottlers might be supposed to require. I find nothing "unmanageable" about the situation with the bottlers in; and this is especially true in a situation in which the Commission is endeavoring to restructure an entire industry.

I

The Facts and the Procedural Posture of the Case

On July 15, 1971 the Federal Trade Commission issued separate complaints charging PepsiCo and other soft drink manufacturers with engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C., Section 45. The complaint alleged that exclusive bottling agreements between PepsiCo and

513 bottlers violated the Act. The agreements grant the bottlers exclusive licenses to use PepsiCo's trademark in a specific territory on soft drinks prepared by the bottlers from the concentrate and syrups purchased from PepsiCo.

On August 11, 1971 three of the 513 bottlers and the Pepsi-Cola Bottlers Association moved to intervene in the FTC proceeding. On August 23, 1971 PepsiCo filed its answer to the complaint and asserted as an affirmative defense the failure of the Commission to join the 513 bottlers as parties. On October 12, 1971, PepsiCo moved before the Hearing Examiner to dismiss the complaint for nonjoinder of indispensable parties. Then on November 18, 1971 the Hearing Examiner issued an order granting the Association and the three bottlers what I believe to be a limited right to intervene. On January 20, 1972 the Hearing Examiner denied PepsiCo's motion to dismiss for nonjoinder of the bottlers and this decision was sustained by the Commission.

On April 28, 1972 PepsiCo instituted this action in the Southern District of New York and applied for a preliminary injunction. The FTC moved to dismiss. While these motions were pending, Pepsi-Cola Corvallis (a bottler) intervened in the District Court action in support of PepsiCo's position. On June 2, 1972 District Judge Cannella denied PepsiCo's application for a preliminary injunction and granted the Government's motion to dismiss the complaint (343 F.Supp. 396). Judge Cannella was of the view that the FTC order denying joinder of individual bottlers was not a final order and that the District Court lacked subject matter jurisdiction over the dispute. PepsiCo and Pepsi-Cola Corvallis both appealed from this decision and this Court heard the appeal on October 12, 1972.

After the notice of appeal to this Court had been filed, the complaint counsel in the FTC proceeding moved for partial summary decision on July 31, 1972. Included in

this motion was a proposed remedy referred to as a "Metro Area Bottler Handicap" provision. The Commission has not at this time had the opportunity to rule on this motion generally or on the "Metro" clause specifically.

II

The District Court Had Subject Matter Jurisdiction

Questions of jurisdiction have always fascinated American judges and many of them, including the writer of this dissent, have failed at times to resist the temptation to seize upon any question of law affecting the jurisdiction of a court as presenting an opportunity for a learned treatise discussing at length every decision of every court having even a remote bearing on the particular point to be decided. In this way the volumes of Law Reports keep piling up with little benefit to anyone. I shall not now succumb to this temptation. On the contrary, I shall content myself with a statement of the reasons supporting my conclusion that the District Court had subject matter jurisdiction, and, without further discussion, cite a few cases which I think are in point.

Statutory authority sustaining the subject matter jurisdiction of the District Court is to be found in the provisions of Section 10(c) of the administrative Procedure Act, 5 U.S.C., Section 704, that "final agency action for which there is no adequate remedy in a court are (is) subject to judicial review." There are numerous instances in which such review has been sustained, despite the interlocutory character of the administrative agency ruling sought to be reviewed. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155 (7th Cir. 1970); *American Communications Association* v. *United States*, 298 F.2d 648 (2d Cir. 1962); *In-*

terstate Broadcasting Co. v. *United States*, 286 F.2d 539 (D.C. Cir. 1960). The only satisfactory test is that involving a pragmatic and flexible approach to insure that the ends of justice will be served. See, *Parisi* v. *Davidson*, 405 U.S. 34 (1972); *McKart* v. *United States*, 395 U.S. 185 (1969). Naturally, where the ruling complained of involves factual findings or the exercise of administrative expertise, review by a court is not allowed.

My reasons for an affirmative application of the pragmatic and flexible approach are:

(1) Every effort to persuade the FTC to join these indispensable parties and thus afford them proper and reasonable notice and an effective hearing has failed. In this sense the ruling of the Commission is final.

(2) The Commission admits that extensive and valuable property and contract rights of the bottlers are involved.

(3) The rulings of the Commission relative to intervention are in my opinion inadequate and illusory. That the rights of those permitted to intervene are limited is apparent on the face of the order which appears at page A-230 of the Appendix. It will not do for the Hearing Examiner to make a statement that he had granted to the intervenors "the right of full participation." We can read, and the order does not provide for "full participation." Those permitted to intervene do not have the right to make motions or argue orally as guaranteed to parties under FTC Rule §3.41(c), 16 C.F.R. §3.41 (1972). FTC rules only permit a party to appeal an initial decision of the Hearing Examiner, FTC Rule §3.52(a), 16 C.F.R. §3.52(a) (1972) and, as noted by Judge Cannella, these intervenors have no right of judicial review. It is, I think, no answer to say that an Appellate Court will probably permit them, on motion, to intervene. In these days of congested calendars some Appellate Courts are not always so accommodating.

(4) PepsiCo's position on the indispensable parties point is a strong one. If the Commission adopts the "Metro Area Bottler Handicap" proposal of complaint counsel, PepsiCo's position on the indispensable parties point will become impregnable.[1] It is not reasonable to take the risk that the whole proceeding will ultimately turn out to be nugatory when this risk can be avoided by the simple expedient of making the bottlers parties. If this is done, all the cumbersome intervention procedures will be avoided.

(5) The lack of notice to the bottlers and the failure to provide them with an effective hearing raise constitutional questions. It is not in the interest of justice that determination of these questions be postponed until the entire proceeding is concluded, especially as these questions are ripe for decision now. I see that my brothers of the majority readily dispose of this question, as they disposed of the question of subject matter jurisdiction, by making an "assumption." In this instance they assume "that all the PepsiCo bottlers have received notice of this proceeding." They naturally cannot order the District Court to direct the FTC to modify its order and provide such notice, as they have voted to affirm Judge Cannella's order dismissing the case for lack of subject matter jurisdiction. But the point cannot be swept under the rug in

1 The "Metro" provision goes much further than an order compelling PepsiCo to "cease and desist" from enforcement of certain features of the contracts with the bottlers. The "Metro" clause not only voids some of the contractual rights of the absent parties but imposes new obligations upon the parties to these contracts. Under the provision the larger bottlers now doing business in the 200 largest metro areas would be limited for ten years to selling in the metro area and forbidden to sell in non-metro areas presently not serviced by large bottlers. The small bottlers in the non-metro areas could sell in the metro areas. Thus it is proposed that by agency action new contracts be created and imposed upon an entire industry, although the interested parties are not represented in the adjudicatory process.

this cavalier fashion. The plain fact is that no formal notice of any kind has been given by the FTC to PepsiCo's 513 bottlers. It is hinted in the majority opinion that the complaint was not published in the Federal Register, see footnote 5, and nothing in this record suggests that such publication was made. It is strange doctrine to me that constitutional requirements of notice[2] and a fair hearing are complied with if the persons entitled to notice are members of a trade association that has moved to intervene in the proceeding. One might just as well suggest that the proceedings have been reported in the newspapers which were probably or possibly read by the 513 PepsiCo bottlers. The affidavit of Robert J. Sisk filed in support of the motion to intervene by Pepsi-Cola Bottlers Association states that 512 of the 513 PepsiCo bottlers are members of the Association and it makes the gratuitous assertion that the Association "effectively represents the interests of all the franchised Pepsi-Cola Bottlers in the United States." This means nothing. It is for the PepsiCo bottlers themselves to say who represents their interests, and, in some cases, these interests are adverse to one another. And how about PepsiCo bottler No. 513?

(6) At first I was inclined to suspect that the effort to have the PepsiCo bottlers made parties and the bringing of this action were in the nature of dilatory maneuvers. But, in the light of the colloquy during the oral argument, and a study of the record as complete as the time would allow, I am now convinced that PepsiCo is doing everything it can to expedite the proper conduct of the FTC proceeding. This is no dilatory move, but a sincere attempt to make the FTC comply with the requirements of law in an orderly way, and to protect its own interests and

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2 See, as to basic notice doctrine required to meet the standards of due process, *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950).

those of the PepsiCo bottlers to whom it may well owe a moral duty of protection.

III

On the Merits the 513 PepsiCo Bottlers Should Be Brought in as Parties

I am still unable to understand why the FTC has taken such an adamant position against making the bottlers parties to this proceeding, unless it anticipates greater scope and control of the whole proceeding to restructure the soft drink industry if confusion reigns supreme. The equivocal manner in which the right of the bottlers to intervene has been granted; the complete failure to provide any form of notice to the separate bottlers or to afford them an effective hearing at which their substantial property and contractual rights may be determined in an orderly manner; and the insistence that, as the so-called right to intervene has been proffered, those who do not choose to come in will be bound by the final order in precisely the same manner and to the same extent as will be those who availed themselves of this so-called right to intervene—all these rulings obviously make for confusion. And, one may wonder, why? Unless there is something that does not meet the eye, it seems clear enough that giving reasonable notice and an effective opportunity to be heard to all interested parties would facilitate rather than hinder the prompt and efficient enforcement of the antitrust laws. Instead, we have all this weaving in and out of procedural niceties.

What puzzles me most is the insistence by my brothers of the majority and by the FTC that, in view of the rulings already made by the Commission on the subject of intervention all those PepsiCo bottlers who do not choose to intervene will, nevertheless, be "bound" by the final deci-

sion of the FTC on the facts and on the law. Surely these absent PepsiCo bottlers will not be "bound" in the ordinary sense of the word, by the application of traditional rules of res judicata or collateral estoppel. This is probably another example of corner-cutting, as in the case of the assumption *arguendo* that the District Court had subject matter jurisdiction, and the assumption that all the PepsiCo bottlers had notice of the proceeding.[3] I say the record makes it plain that no formal notice whatever was given to the PepsiCo bottlers and that this important constitutional requirement of due process cannot be satisfied by mere divination or guesswork. Furthermore, I say the absent bottlers who may choose not to intervene will not be "bound." *Chase National Bank* v. *City of Norwalk*, 291 U.S. 431 (1934); *Western Union Tel. Co.* v. *Foster*, 247 U.S. 105 (1918); *New Orleans* v. *Warner*, 175 U.S. 120; *Burke* v. *Morphy*, 109 F.2d 572 (2d Cir. 1940), *cert. denied*, 310 U.S. 635 (1940); *McGhee* v. *United States*, 437 F.2d 995 (Ct. Cl. 1971).

Perhaps all that is meant by "bound" is the same argument advanced concerning the decision in *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), although this can

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3 Even if it be assumed that the PepsiCo bottlers or most of them knew that a proceeding against PepsiCo was pending in the FTC, this would not suffice. For example, the Supreme Court has declared as violative of due process a New Jersey non-resident motorist statute lacking a "provision for communication to the proposed defendant, such as to create reasonable probability that he would be made aware of the bringing of the suit." (*Wuchter* v. *Pizzutti*, 276 U.S. 13, 25 (1928)). There the defendant actually received notice of the suit but the lack of a formal mechanism to insure the reasonable probability that he would receive notice of the pending suit, rendered the statutory scheme constitutionally defective. Thus, if this Court decides that the Commission must provide a method of notice best calculated to reach the bottlers in order to conform to due process, then the mere fact that most of the bottlers received some form of informal notice would not transform an unconstitutional procedure into a constitutionally permissible one.

scarcely be so because both in the majority opinion and in the FTC argument it is said that the absent parties will be bound because, whether they knew it or not, they had been proffered the right to intervene. No intervention whatever was involved in *National Licorice.*

So, I address myself now to the claim that does depend upon *National Licorice,* which claim, as I understand it, is: that in the event the FTC decides that some part of PepsiCo's contract with its franchisees, the bottlers, is unlawful as a violation of the antitrust laws, no such bottler could thereafter sue PepsiCo for violation of the terms of the contract, because the FTC was acting to enforce public as distinct from private rights. The difficulty with this argument is that it goes too far. There are numerous rights created by these contracts for the benefit of both PepsiCo and the bottlers. The fact that, after a federal Court of Appeals has enforced an FTC cease and desist order, other courts will not rule to the contrary, does not dispose of the issue under discussion. After final disposition of the case by the FTC, I think it will be open to individual bottlers, who are not made parties, to sue PepsiCo for the vindication of other rights inherent in the franchises and that, depending on the terms of the final order, the bottlers who had been joined as parties could not sue without being met by a defense of res judicata or collateral estoppel and a motion for summary judgment. It will, of course, be recalled that the Court in *National Licorice* specifically made the language of the opinion on which my brothers and the FTC rely inapplicable to rights of the individual employees not necessarily involved in the violation of the National Labor Relations Act.

There remains the contention that 513 bottlers are too many, especially as hundreds of others are involved in the proceedings against Crush International Limited, Dr.

Appendix A

Pepper Co., Coca Cola Co., Seven Up Co., and National Industries Co. It is said that joining so many bottlers will make the proceeding "unmanageable." Back in the days of the Medes and the Persians this argument might have seemed plausible. But in a modern setting it has no merit whatever, as appears to be recognized by my brothers of the majority. The advances made by judicial administration in recent years make it perfectly plain that the modest numbers here involved can readily be handled with justice to all. It seems unlikely that more than a few of the PepsiCo bottlers will take the trouble to hire lawyers and come in to defend their rights. Those who do come in, even in considerable numbers, can be formed into consolidated groups or otherwise directed in such fashion as to avoid repetition or confusion. I fact, as I have already said, making the PepsiCo bottlers parties to this proceeding will facilitate in every way the prompt and just disposition of the issues.

Accordingly, I would remand the case to the District Court with instructions to enjoin the FTC from further proceeding in its effort to restructure the soft drink industry until it had made the PepsiCo bottlers parties.

APPENDIX B

(Order of the United States District Court for the Southern District of New York)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1770

PEPSICO, INC.,

Plaintiff,

—against—

FEDERAL TRADE COMMISSION; MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Defendants.

Appearances:

Kaye, Scholer, Fierman, Hays & Handler, by Milton Handler, Esq., New York City, for the plaintiff.
Whitney North Seymour, Jr., U.S. Atty. for the Southern District of New York, by Richard S. Toder, Asst. U.S. Atty., New York City, for the defendants.
Hughes Hubbard & Reed, by Robert J. Sisk, Esq., New York City, for the intervenor Pepsi-Cola Bottling Co. of Corvallis, Inc.

CANNELLA, *J.*

Plaintiff's application for a preliminary injunction, made pursuant to Rule 65(a) of the Federal Rules of Civil Procedure (F.R.Civ.P.), is denied.

Appendix B

Defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter, made pursuant to Rule 12(b)(1), F.R.Civ.P., is granted.[1]

On July 15, 1971 the Federal Trade Commission instituted proceedings against the plaintiff and other soft drink manufacturers alleging violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), which prohibits unfair methods of competition. The complaint against the plaintiff challenges the validity of exclusive bottling agreements in effect between the plaintiff and some 513 franchised Pepsi-Cola bottlers, wherein the bottlers have agreed not to sell Pepsico products outside of a designated territory.

In the course of the proceedings before the FTC, the plaintiff moved before the hearing examiner to dismiss the complaint for non-joinder of each of the 513 bottlers as indispensable parties. The examiner denied the plaintiff's motion, stating in part that as a practical matter it was not feasible to attempt to join all of the bottlers as parties since it would create an unmanageable situation for trial purposes and some bottlers might not be subject to jurisdiction if they operate within a small territory within a state. However, before this order was issued, the examiner indicated at a hearing that all of the bottlers were free to intervene in the proceedings.[2] Three individual bottlers

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[1] A motion made by Pepsi-Cola Bottling Company of Corvallis, Inc. to intervene in support of the application for a preliminary injunction, made pursuant to Rule 24, F.R.Civ.P., was granted without objection during oral argument. See Hearing Minutes, pp. 2-3.

[2] The examiner's order provided that the intervenors would have certain rights, within the control of the examiner, to object to questions, to cross-examine witnesses, to offer evidence, and to file proposed findings of fact and briefs. Absent, of course, would be the right of the intervenors to appeal any action taken by [the] FTC.

and the Pepsi-Cola Bottling Association, an organization representing 512 of the 513 bottlers, elected to intervene while none of the remaining 510 bottlers have sought to intervene up to this point.

On March 23, 1972 the FTC upheld the examiner's decision denying the motion to dismiss the complaint. The Commission stated, after citing numerous authorities, that it was a well established rule that third parties to a contract, the legality of which is being challenged under the antitrust laws, need not be joined in a suit against the first party.[3] Thereafter, on April 28, 1972, the plaintiff instituted this action in this District Court seeking a declaratory judgment and injunctive relief to prohibit the FTC from conducting any further proceedings against the plaintiff unless the bottlers were joined as indispensable parties.

The court concludes that it has no jurisdiction to consider the interlocutory order of the Federal Trade Commission because the plaintiff has not exhausted its administrative remedies.[4] In view of the absence of jurisdiction, the court takes no position on the issue of indispensable parties.

It is a well settled principle of law that a federal district court ordinarily lacks jurisdiction to review interlocutory administrative agency decision.[5] See, e.g., Boire v. Grey-

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[3] In addition, the Commission stated that Rule 19, F.R.Civ.P., even if it were applicable to administrative agency proceedings, would not change the result.

[4] In this regard, the court is in accord with a recent decision by a Georgia federal court involving the Coca-Cola Company. See Coca-Cola Company v. Federal Trade Commission, Civil No. 16484 (N.D.Ga. May 16, 1972). The intervening party seeks to distinguish this case but the court does not agree with its position.

[5] The plaintiff argues that Jewel Companies, Inc. v. Federal Trade Commission, 432 F.2d 1155 (7th Cir. 1970), has relaxed the exhaustion rule where abstract issues of law are involved. However,

hound Corporation, 376 U.S. 473 (1964); Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41 (1938). One court stated the rule as follows in Wolf Corporation v. Securities and Exchange Commission, 317 F.2d 139 (D.C. Cir. 1963) (Burger, J.):

> Judicial power to impose prior restraint is not called an extraordinary remedy without reason. Even as between private parties the ordinary remedy is legal action after injury. Prior restraint is granted only upon a strong showing and is subject to definite and well established limitations. Prior restraint against governmental action, regular on its face and under color of authority, is even more cautiously exerted. Still higher hurdles stand in the way of prior restraint against the processes of a regulatory body exercising quasi-judicial powers which can be judicially reviewed as a matter of right before they become final. In this third category the jurisdiction of the regulatory or administrative body is exercised within the framework of a statutory scheme in which it acts as an arm of Congress; moreover it has established patterns of procedure and acts in a context where courts have long acknowledged a considerable deference to the specialized experience and competence of such a body. To exert judicial power to stop processes of this third category, which can always be judicially reviewed when the story is fully told and recorded, is an extraordinary step in the usual as well as the legally artful sense of that word. 317 F.2d at 142-43.

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the crucial distinction in that case was that the aggrieved party was unable to raise the issue again from a later order of the FTC. In this case the aggrieved party will get relief from the Circuit Court rather than from one district court judge.

In effect, piecemeal review of interlocutory matters should be rarely exercised.

The court finds that the Commission's denial of the motion to dismiss for non-joinder is not in the nature of a final order and therefore, under the applicable statutes, it cannot be reviewed by the federal courts at this stage of the proceedings. Cf. Ritter v. Wyoga Gas & Oil Corporation, 110 F.2d 524 (3rd Cir.), cert. denied, 311 U.S. 669 (1940). The usual avenue for judicial review of actions taken by the Federal Trade Commission is through the courts of appeal after a final cease and desist order issues. See 15 U.S.C. §45(c)(d). Similarly, the Administrative Procedure Act provides for judicial review of intermediate agency action only upon review of the final agency action. 5 U.S.C. §704.

The courts, however, have carved out certain narrowly circumscribed areas where judicial review is appropriate before the agency proceedings have terminated. One of these exceptional circumstances includes instances where an agency has very clearly violated an important constitutional right. See, e.g., Herald Company v. Vincent, 392 F.2d 354 (2d Cir. 1968); Fay v. Douds, 172 F.2d 720 (2d Cir. 1949). When the agency acts in excess of its delegated powers and contrary to the applicable statute, the courts have also seen fit to intervene. See, e.g., Breen v. Selective Service Local Board No. 16, 396 U.S. 460 (1970); Leedom v. Kyne, 358 U.S. 184 (1958); Federal Trade Commission v. B.F. Goodrich Company, 242 F.2d 31 (D.C. Cir. 1957); Skinner & Eddy Corporation v. United States, 249 U.S. 557 (1919). Another circumstance justifying interference in the administrative process occurs when the action involves a question of high national interest because of international complexities. See McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963).

Appendix B

The plaintiff argues that the Commission's refusal to join the bottlers as indispensable parties is such an exceptional circumstance which would allow this court to entertain jurisdiction. More specifically, the plaintiff claims, *inter alia,* that the bottlers, who are facing serious business uncertainty, are threatened with the deprivation of valuable contract and property rights without due process of law. In addition, the plaintiff urges that the question of joinder should be resolved at this point rather than waste a great deal of time and expense by raising the issue when a final order is issued. The court has considered all the arguments and concludes that there are no substantial grounds based upon the exceptions developed by case law to warrant the extraordinary exercise of jurisdiction by this court.

In support of its contention that the court has jurisdiction, the plaintiff cites American Communications Association v. United States, 298 F.2d 648 (2d Cir. 1962) and Interstate Broadcasting Company v. United States, 286 F.2d 539 (D.C. Cir. 1960) which involved proceedings before the Federal Communications Commission in which certain parties were denied the right to intervene. These cases held that immediate review was desirable so that the intervenors could be heard from the start in order to advance the public interest. Clearly this is not the situation presented in this case since the bottlers have not been deprived of their rights to intervene in the FTC proceedings.

The plaintiff, citing the Supreme Court's decision in McKart v. United States, 395 U.S. 185 (1969), also contends that this court should exercise jurisdiction since the Commission's administrative expertise is not involved and judicial review would not be significantly aided by an additional administrative decision. However, the Court, in

McKart, emphasized that the administrative process was at an end and that the defendant was faced with a criminal prosecution. Moreover, in the case at bar, it cannot be assumed that judicial review will not be enhanced by allowing the administrative process to be completed. In addition, it is conceivable that the Commission could alter its position or refuse to issue a cease and desist order, in which case there would be no need for judicial review. See Sterling Drug Inc. v. Federal Trade Commission, 450 F.2d 698, 711 (D.C. Cir. 1971).

In view of the foregoing, the plaintiff's application for a preliminary injunction is denied; the defendant's motion to dismiss the complaint is granted.

So ordered.

Dated: New York, N. Y.
June 2, 1972

JOHN M. CANNELLA
U.S.D.J.

APPENDIX C

(Order of the Federal Trade Commission)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

DOCKET No. 8853

In the Matter of

CRUSH INTERNATIONAL LIMITED, a corporation; and BEVERAGES INTERNATIONAL INC., a corporation; and CRUSH INTERNATIONAL INC., a corporation.

DOCKET No. 8854

In the Matter of

DR. PEPPER COMPANY, a corporation.

DOCKET No. 8855

In the Matter of

THE COCA-COLA COMPANY, a corporation;
COCA-COLA BOTTLING CO. (THOMAS), INC., a corporation;
COCA-COLA BOTTLING WORKS (THOMAS), INC., a corporation;
and
COCA-COLA BOTTLING WORKS 3rd, INC., a corporation.

Appendix C

DOCKET No. 8856

In the Matter of

PEPSICO, INC., a corporation.

DOCKET No. 8857

In the Matter of

THE SEVEN-UP COMPANY, a corporation.

DOCKET No. 8859

NATIONAL INDUSTRIES INC., a corporation; and
COTT CORPORATION, a corporation.

ORDER RULING ON MOTIONS TO DISMISS FOR FAILURE TO JOIN INDISPENSABLE PARTIES

This matter is before the Commission upon requests for permission to file interlocutory appeals by the respondents in Docket Nos. 8853-8857 and Docket No. 8859, upon complaint counsel's response thereto, filed February 17, 1972, and upon respondent Dr. Pepper Company's response to complaint counsel's reply, filed February 29, 1972.[1] Al-

[1] The motions are as follows: Crush International Limited, Docket No. 8853—application for leave to file an interlocutory appeal or to treat motions as certified filed February 4, 1972; Dr. Pepper Company, Docket No. 8854—request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to dismiss the complaint for failure to join indispensable parties and for a stay of proceedings, and request for permission to file an interlocutory appeal from the order of the hearing examiner denying respondent's motion to amend the complaint to join the Dr. Pepper Company bottlers as

though the motions are not identically styled and vary somewhat in the specific relief sought, they nevertheless involve the same question and will therefore be considered together.

The question arises as a result of complaints issued by the Commission against several soft drink companies challenging the legality of respondents' contracts with their respective bottlers. Respondents take the position that their bottlers are indispensable parties to these proceedings and that absent their joinder the complaints should be dismissed. Motions to this effect were denied by the examiner and these requests for permission to appeal followed. Before considering these requests we will deal with the procedural issues of the examiner's authority to rule on a motion to amend the complaint by the addition of parties to Commission proceedings and his authority to rule on motions to dismiss.

I

The Commission has consistently taken the position that the examiner has no authority to amend a complaint by the addition or deletion of parties except to the extent that his ruling deals with matters of procedure rather than sub-

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co-respondents filed February 4, 1972. The Coca-Cola Company, Docket No. 8855—application (I) for leave to file interlocutory appeals and (II) to treat motions to dismiss as certified filed January 18, 1972; PepsiCo, Inc., Docket No. 8856—application for leave to file interlocutory appeal or to treat motions as certified filed January 31, 1972; The Seven-Up Company, Docket No. 8857—application for permission to file (1) appeal for de novo consideration of respondent's motion to dismiss, or (2) interlocutory appeal filed January 31, 1972; National Industries, Inc., Docket No. 8859—respondents' request for permission to file interlocutory appeal from the hearing examiner's order denying motion to dismiss the complaint for failure to join indispensable parties filed February 3, 1972.

stance such as the deletion of an individual respondent who has deceased or the substitution of respondents improperly named, etc. The same applies to motions to dismiss because both involve the "reason to believe" concept of Section 5 which only the Commission itself can express. Both issues were involved in the *Suburban Propane Gas Corp.* case, Docket No. 8672, Order Ruling on Interlocutory Appeals, May 25, 1967, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶17,965. On the issue to amend the complaint by a joinder of an additional party we there held that it should have been certified to the Commission. As to the motion to dismiss we stated as follows:

> "The examiner recognized that the question involved the administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; Drug Research Corp., Docket No. 7179 (October 3, 1962). [Footnote omitted] Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination." at 20,337.

The Commission has made a distinction however, between those instances in which the motion to dismiss challenges the Commission's legal power to issue the complaint and those in which it seeks to probe the Commission's discretion or judgment on whether or not a proceeding would be in the public interest. It is only in the latter instance in which the examiner is considered to be without authority to rule. See, *The Drive-X Company, Inc.*, Docket No. 8615, Order Denying Application for Leave to File Interlocutory

Appeal or in the Alternative for an Order Requiring Certification of Question, June 10, 1964. While it is clear that the present situation falls within the former, *i.e.*, the category of cases challenging the Commission's legal authority to issue the complaint, and hence within the examiner's authority to decide, we have nevertheless determined that that question is so intertwined with the question of amending the complaint by the addition of parties that both should have been certified to the Commission.

Although the matter has not been so certified, we are not precluded from considering it, since it is before us upon respondents' request for leave to file interlocutory appeals. A similar procedure was followed in *Maremont Corp.*, Docket No. 8763, Order Denying Respondent's Request to File Interlocutory Appeal and Motion to Dismiss the Complaint or Stay Proceedings, October 3, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶18,542. There we held as follows:

> "Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964). The hearing examiner should properly have certified this part of respondent's motion to the Commission for the Commission's determination and action. Nevertheless, in view of respondent's

application for permission to file an interlocutory appeal, the matter is now before the Commission in the same posture as it would have been had the examiner certified it. Accordingly, while our holding is that the hearing examiner erred in failing to certify the motion, this in the circumstances was not to respondent's prejudice and the motion will now be treated as though it has been properly certified." at 20,889.

We will follow this procedure in the instant proceeding. At the same time we will consider the examiner's ruling as his recommendation to the Commission for the disposition of this matter.

II

The question presented for our decision is whether respondents' bottlers who are parties to the contract being challenged by the complaint are indispensable parties to this proceeding. In essence the position urged upon us by the respondents is that an adjudication of these contracts involves substantial rights of the bottlers who, over the years, have expended goodly sums of money in the development of their business operations in reliance on the terms of their contracts and hence due process requires that they be made a party so that they may be bound by the outcome of this proceeding as well as protect their interests. Respondents are also concerned that the failure of joinder may subject respondents to multiple litigation with their bottlers and result in inconsistent future adjudications. Absent a joinder of the bottlers, respondents ask that the complaints be dismissed.

The examiner's ruling complained of contains the following statements:

Appendix C

"It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondents have with their bottlers may very well directly affect substantial property rights these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondents' trademarked products, it would be without recourse to sue the respondents for damages or for injunctive relief requiring them to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

"As a practical matter, however, it is not feasible to join all of the respondents' bottlers as parties to this proceeding. In the first place, the large number of them (1186) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce thereby depriving the Commission of jurisdiction over such bottlers." Order Denying Motion to Dismiss the Complaint for Nonjoinder of Indispensable Parties, January 7, 1972, page 3-4.

The examiner was guided in his decision by Rule 19 of the Federal Rules of Civil Procedure and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968) a case interpreting the requirements of Rule 19.

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any

contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE'S FEDERAL PRACTICE, Section 19.10 at 2344. Respondents invite attention to two 1921 proceedings involving this Commission which allegedly support the proposition that the complaint should be dismissed for failure to join indispensable parties. The first is *Fruit Growers' Express Inc.* v. *F.T.C.*, 274 F.205 (7th Cir. 1921) in which the court vacated a Commission cease and desist order on the ground that the Commission was without jurisdiction because the facts involved common carriers who are within the sole jurisdiction of the Interstate Commerce Commission. The second is *Sinclair Refining Co.* v. *F.T.C.*, 276 F.686 (7th Cir. 1921), in which the failure to join what the reviewing court considered to be an indispensable party was advanced as one of the reasons for setting aside an order to cease and desist *after* the court had decided that no violation had been shown. Neither case can be considered a viable precedent for the proposition advanced here. Moreover, a subsequent decision by the same court specifically upheld the Commission's view and with specific reference to these two decisions *Automatic Canteen* v. *F.T.C.*, 194 F.2d 433 (7th Cir. 1952), *rev'd in part on other grounds*, 346 U.S. 61 (1953). Finally, the courts in a procession of decisions have failed to join or otherwise consider indispensable third parties to a contract the legality of which was being challenged under the antitrust laws. See, *United Shoe Machinery Corp.* v. *U.S.*, 258 U.S. 451 (1922); *U.S.* v. *Paramount Famous Lasky Corp.*, 282 U.S. 30 (1930); *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208

(1939); *U.S.* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *U.S.* v. *National Lead Co.*, 332 U.S. 319 (1947); *U.S.* v. *Schine Theatres, Inc.*, 334 U.S. 110 (1948); and *U.S.* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841 (S.D.N.Y. 1957), *aff'd* 348 U.S. 242 (1959). The last time this Commission had to consider this question was in *L. G. Balfour Co.*, Docket No. 8435, July 29, 1968, CCH Trade Reg. Rep. [1967-1970 Transfer Binder] ¶19,485 in which it came to the same conclusion. In *Eastman Kodak Co.*, Docket No. 6040, similar arguments were advanced with respect to the challenged resale price maintenance contracts Kodak had with over 6,000 retailers. What we said there is pertinent here:

> "It is true that if an order prohibiting respondent from fixing and maintaining resale prices in accordance with its agreements with these dealers is issued, it would affect their contractual rights. However, no such prohibition will be issued herein unless the Commission determines that these agreements are in unreasonable restraint of trade and should not be continued. The courts have regularly struck down systems deemed violative of the antitrust laws even though such systems included leases, licenses and other forms of agreements where the other parties thereto were not before the court and where the enjoined covenants were clearly of benefit to said other parties." Order Disposing of Motion to Strike and Respondents' Motion to Dismiss, September 25, 1953.

It is well established, therefore, that third parties to a contract the legality of which is being challenged under the antitrust laws need not be joined in a suit against the first party and are thus not considered indispensable parties.

Appendix C

In *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940) the court observed that "in proceedings before the Federal Trade Commission, the order restraining unfair methods of competition may preclude the performance of outstanding contracts by the offender. Such orders have never been challenged because the holders of the contracts were not made parties." at 366. In light of the foregoing we believe respondents' claim that due process requires the joinder of the bottlers as indispensable parties and absent that, a dismissal of the complaints, to be without merit.

Respondents also assert that the failure to join the bottlers may subject respondents to the risks of multiple litigation and inconsistent future adjudications. Our own understanding of the applicable legal principles leads us to conclude that such an eventuality is highly unlikely. A contract which has been declared illegal cannot be enforced by either party.

> "A party to an illegal bargain can neither recover damages for breach thereof nor, by rescinding the bargain, recover the performance that he has rendered thereunder or its value. . . ." *Restatement of Contracts,* Section 598 (1932)

Similarly, supervening illegality renders a contract unenforceable even if it was legal when entered into *Restatement of Contracts,* Section 548. In this regard, administrative proceedings are considered to have the same effect as do statutory provisions.

> "Clearly prevention by an executive and administrative order designed for the benefit of the general public may be considered excusable impossibility whether the order is directed to the general public or to an individual." 6 *Williston on Contracts,* Section 193 (Rev. Ed., 1938).

Appendix C

We turn now to the question of whether, by using Rule 19 of the Federal Rules of Civil Procedure, a different result would be dictated. The Federal Rules of Civil Procedure are not, of course, applicable to administrative agency proceedings which are governed by their own rules of practice. Nevertheless, they can provide an analytical framework for the disposition of related issues. Rule 19(a) provides that:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

As to (1), it is clear that depending on the outcome, complete relief can be accorded in this proceeding without joining the bottlers. Should the allegations of the complaint be upheld, the relief sought by the order, the termination of the exclusive territorial contracts, can be accomplished by an order to cease and desist naming the presently named respondents. The second part of Rule 19(a) is divided into two parts—an unprotected interest and a substantial risk of incurring inconsistent obligations in relation to that interest. If, however, that interest is not a legally protected one, as for example rights pursuant to a contract

declared illegal under the antitrust laws, it cannot serve as a basis for a joinder of allegedly indispensable parties. The fact that a contract may have previously not been illegal does not alter this result. The Commission was created for, among others, the purpose of prohibiting hitherto unchallenged trade restraints. *F.T.C.* v. *Sperry & Hutchinson Co.*, —— U.S. —— 1972. As for the risk of incurring inconsistent obligations due to the failure to join the bottlers, Rule 19 requires that risk to be substantial before it will be considered as a reason for a joinder of additional parties. As we have mentioned above, that risk cannot be considered substantial. Our review of the applicable case law convinces us that the bottlers are not indispensable parties within the meaning of Rule 19. See, *e.g.*, *Bennie* v. *Pastor*, 393 F.2d 1 (10th Cir. 1968), citing *Shields* v. *Barrow*, 58 U.S. (17 How.) 129 (1854) and *Provident Bank* v. *Patterson*, 390 U.S. 102 (1968); *Chiodo* v. *General Waterworks Corp.*, 380 F.2d 860 (10th Cir. 1967), *cert. denied*, 389 U.S. 1004; *Stevens* v. *Loomis*, 334 F.2d 775 (5th Cir. 1964).

III

One final aspect of this matter need be considered. In its request, the Coca-Cola Company points to *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.*, 269 F.796 (D. Del. 1920) as supportive of its position. There, in a dispute over the contract, the court found these exclusive territorial contracts to be lawful and as not "having an effect or intended to have an effect to defeat or lessen competition or to encourage or tend to create a monopoly, nor do I find anything therein that may be said to be in unreasonable restraint of trade." at 814. We have carefully reviewed that decision and conclude that it does not support respondent Coca-Cola's position.

Appendix C

IV

A number of the respondents have requested the opportunity for oral argument. Under the circumstances, we do not believe that an oral argument would serve any useful purpose. Accordingly,

IT IS ORDERED that the motions to dismiss for failure to join indispensable parties be, and they hereby are, denied.

By the Commission.

SEAL

/s/ CHARLES A. TOBIN
Charles A. Tobin
Secretary

ISSUED: March 23, 1972

APPENDIX D

(Order of the Administrative Law Judge)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

DOCKET No. 8856

In the Matter of

PEPSICO, INC., a corporation

ORDER DENYING MOTION TO DISMISS THE COMPLAINT FOR NONJOINDER OF INDISPENSABLE PARTIES

Respondent, by its counsel, has filed a motion to dismiss the complaint for nonjoinder of its 513 bottlers, all of whom it contends are indispensable parties to this proceeding. Respondent alleges that pursuant to the provisions of its exclusive bottling appointment agreements, each of respondent's bottlers has acquired the exclusive right in a defined territory to bottle and distribute soft drinks sold under respondent's registered trademarks. Respondent asserts that in reliance on these agreements its bottlers have invested many millions of dollars over the years in plants, equipment and distribution facilities for the manufacture and sale of respondent's products and in creating, developing and maintaining markets for such products. The respondent asserts that its bottlers have each acquired a valuable vested property right in such contract provisions which have heretofore been recognized as lawful and reasonable ancillary restraints accompanying valid trademark licenses and that to invalidate such provisions would result in many of the bottlers being forced

out of business and deprived of valuable investments and property rights and would constitute a denial of due process of law to respondent and to each of its bottlers.

Counsel in support of the complaint have filed an answer opposing the respondent's motion to dismiss.

Counsel for the respondent and in support of the complaint agree that while the Federal Rules of Civil Procedure are not binding upon the hearing examiner or the Commission, Rule 19 of such Rules supplies a practical framework within which to arrive at a decision on the questions presented by the respondent's motion.

Rule 19, in pertinent part, provides as follows:

> "Rule 19. *Joinder of Persons Needed for Just Adjudication*
>
> "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would

render the venue of the action improper, he shall be dismissed from the action.

"(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in a person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." 28 U.S.C.A. 19 (1971 Cum. Annual Pocket Part)

It is quite apparent that an ultimate decision by the Commission striking the exclusive territorial provisions from the various franchise contracts that the respondent has with its bottlers may very well directly affect substantial property rights of these bottlers have acquired and own as a result of their franchise contracts. If a bottler were to lose its exclusive territory within which to sell the respondent's trademarked products, it would be without recourse to sue the respondent for damages or for injunctive relief requiring it to provide the protection against competition from other bottlers who may well invade its territory. To that extent, therefore, the bottlers may be considered indispensable.

As a practical matter, however, it is not feasible to attempt to join all of the respondent's bottlers as parties to this proceeding. In the first place, the large number of them (513) would create a completely unmanageable situation for trial purposes. Secondly, it is presumed that a substantial number of such bottlers operate within a small territory within a state, and consequently, may well not be engaged in commerce, thereby depriving the Commission of jurisdiction over such bottlers.

In *Provident Bank* v. *Patterson*, 390 U.S. 102 (1967), the Supreme Court considered the present revised Rule 19. In that case, after a verdict had been obtained in the District Court, the Circuit Court of Appeals dismissed the action on the ground that an indispensable party had not been made a party to the action. The question of indispensable parties was raised for the first time in the Circuit Court of Appeals. The Supreme Court reversed, since the Circuit Court failed to "follow the provision of Rule 19 of the Federal Rules of Civil Procedure that findings of 'indispensability' must be based on stated pragmatic considerations." (at p. 106) The Supreme Court held that the question of indispensable party was not a substantive right unaffected by the Federal Rules of Civil Procedure. The Court pointed out that the principal consideration is whether or not it is "feasible" to join a party and that the decision of whether or not to join a party pursuant to Rule 19 requires the applying of the equity and good conscience test of Rule 19(b) (at p. 109).

In a number of antitrust cases, it has been recognized by the Supreme Court that the courts possess the power to strike down "systems deemed violative of the anti-trust laws even though such systems include leases, licenses, and other forms of agreements, and the lessees, licensees,

and other parties to the agreements (are) not before the Court." *U.S.* v. *National Lead Co.*, 63 F. Supp. 513, 525 n. 8 (S.D.N.Y. 1945), affirmed, 332 U.S. 319 (1947). See also, *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350 (1940).

An association of the respondent's bottlers representing 512 of 513 of such bottlers has moved to intervene as an interested party in this proceeding. This motion to intervene has been granted by the hearing examiner. It was not granted on a limited basis but with full right of counsel for the association to participate in the hearings, including the right to object to evidence, cross-examine witnesses and proffer evidence as well as to file proposed findings and briefs at the conclusion of trial. While this intervenor was not made a party to the proceeding the bottlers will have their rights, to the extent that they may differ from the respondent's rights, fully represented during the course of the hearings.

Consequently,

IT IS ORDERED that the respondent's motion to join all of its bottlers as being indispensable parties to this proceeding is hereby denied.

/s/ ANDREW C. GOODHOPE
Andrew C. Goodhope
Hearing Examiner

January 20, 1972

APPENDIX E

(Judgment of the United States Court of Appeals for the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of November, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY,

Chief Judge,

HON. HAROLD R. MEDINA,
HON. ROBERT P. ANDERSON,

Circuit Judges.

PEPSICO, INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION; MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDINER JONES, DAVID S. DENNISON, JR., individually and as Commissioners of the Federal Trade Commission,

Defendants-Appellees,

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC.,

Intervenor-Appellant.

Appendix E

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. Daniel Fusaro
Clerk

A true copy,
A. Daniel Fusaro,
Clerk.

APPENDIX F

(Constitutional Provisions, Statutes and Rules Involved)

UNITED STATES CONSTITUTION

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

JUDICIAL CODE

28 U.S.C. § 1331(a). Federal question; amount in controversy; costs

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Con-

gress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. § 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Appendix F

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Appendix F

FEDERAL TRADE COMMISSION ACT

15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices.

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or

agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Appendix F

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or pratice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41–46 and 47–58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expira-

tion of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the

date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modifica-

tion or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint,

order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Com-

mission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Com-

mission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating

to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision

(a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

LIBRARY
SUPREME COURT, U.S.

Nos. 72-1420, 72-1422 and 72-1504

JUN 13 1973

In the Supreme Court of the United States

OCTOBER TERM, 1972

PEPSICO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

THE COCA-COLA COMPANY, COCA-COLA BOTTLING CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE FIFTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1420

PEPSICO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

No. 72-1422

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v.

FEDERAL TRADE COMMISSION, ET AL.

No. 72-1504

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v.

FEDERAL TRADE COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND THE FIFTH CIRCUITS

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

In each of these three cases, the question is whether the courts properly refused to enjoin the Federal Trade Commission from conducting an administrative proceeding because of the agency's failure to include as respondents allegedly indispensable parties.

The two Commission complaints involved in these cases charged that a manufacturer of soft drinks had imposed illegal territorial restrictions upon its bottlers, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The complaint in one case (*PepsiCo*) named only the manufacturer as a respondent; the complaint in the other case (*Coca-Cola*) also named three licensees. Neither complaint named the bottlers. The Commission, however, permitted all bottlers who sought to intervene to do so. The claim is that the Commission also was required to include the several hundred bottlers of each manufacturer as parties, and that its failure to do that so infected the administrative proceedings as to require the courts to enjoin the agency.

1. The Commission's complaint againt PepsiCo, the manufacturer of Pepsi-Cola, was filed in July 1971 (Pet. No. 72-1420, App. 3a). The Commission permitted three bottlers of the drink and a trade association, whose membership included 512 of the 513 bottlers of Pepsi-Cola, to intervene (*id.*, 4a). PepsiCo moved to dismiss the Commission proceeding on the ground that the other bottlers were indispensable parties. The administrative law judge and the Commission denied the motion (*id.*, Apps. C and D).

PepsiCo then filed suit in the United States District Court for the Southern District of New York to enjoin further Commission proceedings unless all bottlers were

made parties (*id.*, 5a). Petitioner in No. 72-1422, Pepsi-Cola Bottling Company of Corvallis, which had not intervened in the administrative proceedings, intervened in the district court in support of PepsiCo (*id.*, 4a, 6a). The district court denied a preliminary injunction and dismissed the complaint, holding that (*id.*, 35a):

> the Commission's denial of the motion to dismiss for non-joinder is not in the nature of a final order and therefore, under the applicable statutes, it cannot be reviewed by the federal courts at this stage of the proceedings.

A divided Court of Appeals for the Second Circuit affirmed. In an opinion by Judge Friendly, the court noted that the Commission would entertain additional applications to intervene by other bottlers, and it ruled that "the four intervenors and other bottlers who may reasonably apply will receive from the FTC all those rights 'provided by law' that are essential to a fair hearing. 16 C.F.R. §3.14" (*id.*, 8a). Although assuming *arguendo* that judicial intervention might be proper if the agency were acting plainly beyond its jurisdiction, the court concluded that petitioners had not "brought themselves within the possibly over-generous principle with respect to reviewability that we have put forward" (*id.*, 13a).

PepsiCo contended that the bottlers were indispensable parties because a Commission order directing it to cancel the territorial restrictions on the franchisees' marketing areas might subject it to liability in a suit by a bottler whose theretofore exclusive territory had been invaded by another. The court rejected this contention (*id.*, 14a):

> The proposition that a court would hold one person liable for doing something within the United States which a federal administrative agency, acting

within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some astonishment. This is particularly so in a context where the persons who would seek to enforce liability know of the proceeding and have had an opportunity to intervene before the agency "in order to safeguard their interests." *Consolidated Edison Co.* v. *NLRB, supra,* 305 U.S. at 234.

2. The *Coca-Cola* case, No. 72-1504, is similar. The Commission permitted intervention requested by seven bottlers, but refused to join all the bottlers as parties (Pet. No. 72-1504, App. 2a). The Coca-Cola Company and bottlers of Coca-Cola filed suit in the United States District Court for the Northern District of Georgia to enjoin the Commission proceedings unless all the bottlers were made parties. The district court dismissed the suit, and the Court of Appeals for the Fifth Circuit affirmed (*id.,* 3a). That court held that any defect in the Commission's proceeding resulting from failure to join necessary parties did not warrant an exception to "the tightly circumscribed exceptions to 'the long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.' *Myers* v. *Bethlehem Shipbuilding Corp.,* 30 U.S. 41, 50-51 (1938)" (*id.,* 3a).

ARGUMENT

Both courts of appeals below correctly refused to enjoin the Commission's administrative proceedings on the basis of the claim that the agency had failed to join necessary parties. If the claim has any merit, it can be fully litigated on judicial review of any order the Commission ultimately may issue. There is no occasion

to interrupt the administrative proceedings at their threshold to litigate this collateral issue.[1]

The theory upon which the manufacturers are attempting to halt the Commission proceedings is the possibility that they might be subjected to liability as a result of a Commission order that would cancel the existing territorial limitations in their franchise agreements and, contrary to those agreements, would permit bottlers to sell in each other's territory. As the Second Circuit held, however, this possibility is too remote to justify at this time judicial intervention in the administrative proceedings. "The agency may find in favor of the respondent; the case may be settled; the reviewing court * * * will be in a better position to assess the matter when all the cards have been played" (Pet. No. 72-1420, App. 9a-10a). See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *United States* v. *Los Angeles & S.L.R.R.*, 273 U.S. 299, 309-310. Moreover, as that court also pointed out, there is little practical likelihood that "a court would hold one person liable for doing something within the United States which a federal administrative agency, acting within its jurisdiction, had found to be necessary for the enforcement of a federal regulatory statute" (*id.*, 14a). See *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 365; *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30; *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F. 2d 64 (C.A. 4).

It is also contended that the bottlers' interests themselves may be prejudiced by a Commission order direct-

[1] In *The Seven-Up Company* v. *Federal Trade Commission*, No. 72-1680, decided May 31, 1973, the Court of Appeals for the Eighth Circuit recently similarly refused to enjoin a companion Commission proceeding involving another soft drink manufacturer.

ing the manufacturers to terminate the territorial restrictions. The Commission, however, permitted those bottlers who sought to intervene to do so, and it will entertain requests for intervention by others. Such intervention would fully protect the interests of any other bottlers who believe that their position is not now being adequately presented.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

DOJ-1973-06

SUPREME COURT, U. S.
SUPREME COURT, U. S.
FILED
JUN 25 1973

In the

Supreme Court of the United States

October Term, 1972

No. 72-1422

Pepsi-Cola Bottling Company of Corvallis, Inc.,

Petitioner,

—v.—

Federal Trade Commission, Lewis J. Engman, Paul Rand Dixon, A. Everette MacIntyre, Mary Gardiner Jones, David S. Dennison, Jr., individually and as Commissioners of the Federal Trade Commission,

Respondents.

REPLY BRIEF FOR PETITIONER PEPSI-COLA BOTTLING COMPANY OF CORVALLIS, INC. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Pepsi-Cola Bottling Company of Corvallis, Inc. ("Pepsi-Corvallis") submits this brief in reply to respondents' memorandum in opposition to the separate petitions for writs of certiorari to the Courts of Appeals for the Second and Fifth Circuits filed by Pepsi-Corvallis and PepsiCo, and by Coca-Cola Company and various intervenors, respectively.

The Government Brief Reveals The Conflict Between The Second And Fifth Circuits And Fails To Address Itself To The Denial Of Due Process Identified By Judge Medina And Pepsi-Corvallis.

There is a distinct conflict between the Second and Fifth Circuits on the problems raised by this petition which the Government's memorandum in opposition makes manifest. Moreover, the Government does not dispute that those problems are of national importance.

The Government takes the position that the Second Circuit's ruling that *absent Pepsi* bottlers will be *bound* eliminates the risk to PepsiCo of multiple litigation and at the same time contends that the Fifth Circuit preserves to *Coca-Cola* bottlers the opportunity for just such multiple litigation.

No attempt is made to resolve the evident inconsistency in this position or to deal with the fact that the courts are treating *Pepsi* bottlers and their principal competitors in different and discriminatory ways.

Nowhere does the Government address itself to the petition of Pepsi-Corvallis or the plight of other absent *Pepsi* bottlers who now must elect, according to the Second Circuit, either to intervene in these complex antitrust proceedings or to stay out and be bound by the results. The claim of denial of due process to Pepsi-Corvallis, which was the subject of an eleven-page dissent by Judge Medina below, does not receive even a one-line comment from the Solicitor General.

Surely a constitutional issue which profoundly affects an entire national industry and which at least one highly-respected judge has found to be of great significance deserves to be briefed by the Government.

Does the Government deny that the absent Pepsi *bottlers will be deprived of due process of law by the novel concepts of the Second Circuit?*

Does the Government dispute Judge Medina's conclusion that there is a serious constitutional question here?

Does the Government believe that mandatory obligations may be imposed on non-parties to an agency proceeding?

These are important questions of policy and law which should not be "swept under the rug." *

The Eighth Circuit Decision Further Exposes The Conflict Among The Circuits.

Subsequent to the filing of the petition herein, the United States Court of Appeals for the Eighth Circuit decided *Seven-Up Co.* v. *Goodhope.*** Faced with the conflict between the Second Circuit and the Fifth Circuit, the Eighth Circuit expressly chose to follow the reasoning of the latter:

> "The Coca-Cola Company and PepsiCo, Inc., * * * have both unsuccessfully presented the identical claim to the Fifth and Second Circuit. * * * *We particularly agree with the reasoning of the Fifth Circuit* and likewise hold that the action was properly dismissed for lack of subject matter jurisdiction." (2a) (emphasis added)

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* Medina, J., 472 F.2d at 193, Petition for Certiorari of Pepsi-Corvallis at 24a.

** (Eighth Cir. Docket No. 72-1630 filed May 31, 1973). A copy of the Eighth Circuit's opinion, which has not been officially reported at the time of the filing of this brief, is annexed hereto as an Appendix. References to pages in the Appendix will be cited in the form "—a."

The Eighth Circuit thus rejected the Second Circuit's novel concept that absent bottlers could be bound *in personam* by any order entered in the FTC proceeding.

As a result, Pepsi-Corvallis and other *Pepsi* bottlers in the Second Circuit will be bound by the outcome of the FTC proceedings (although they are *not* parties thereto) and will be subject to any FTC order rewriting their franchise agreements, while *Coca-Cola, Seven-Up* and even other *Pepsi* bottlers in the Fifth, Eighth and other Circuits will not.

Prompt resolution of the conflict thus illuminated by the Eighth Circuit and by the Government's memorandum is required in the national interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should in all respects be granted.

Dated: New York, New York
June 25, 1973

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 72-1680

THE SEVEN-UP COMPANY,

Appellant,

vs.

FEDERAL TRADE COMMISSION, MILES W. KIRKPATRICK, PAUL RAND DIXON, A. EVERETTE MACINTYRE, MARY GARDNER JONES, DAVID S. DENNISON, JR., ANDREW C. GOODHOPE, Administrative Law Judge,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI.

Submitted: April 12, 1973.

Filed May 31, 1973.

Before LAY and STEPHENSON, Circuit Judges, and TALBOT SMITH, District Judge.*

STEPHENSON, Circuit Judge.

The Seven-Up Company appeals from the order of the District Court dismissing appellant's claim for lack of

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* Eastern District of Michigan, sitting by designation.

subject matter jurisdiction. Seven-Up sought below to enjoin the Federal Trade Commission from further action in its proceedings against Seven-Up, alleging that the administrative proceeding itself is fatally defective without the joinder of Seven-Up's 470 bottlers as indispensible parties.

Seven-Up, along with several other major soft drink manufacturers,[1] has been charged by the FTC with using an unfair method of competition through its license agreements with bottlers whereby the bottlers agree to not sell outside of designated geographical areas. Seven-Up moved to dismiss the administrative complaint, claiming that the bottlers are indispensible parties since they have important contract rights which are at stake in the proceedings. The motion to dismiss was denied by the Hearing Examiner whose order was then upheld by the Commission.[2] Seven-Up then petitioned the District Court for both injunctive and declaratory relief.

The Coca-Cola Company and PepsiCo., Inc., other respondents in the FTC proceedings, have both unsuccessfully presented the identical claim to the Fifth and Second Circuit. *The Coca-Cola Company* v. *FTC*, —— F.2d —— (CA5 No. 72-2270 February 15, 1973) and *PepsiCo., Inc.* v. *FTC*, 472 F.2d 179 (CA2 1972). We particularly agree with the reasoning of the Fifth Circuit and likewise hold

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[1] The manufacturers were charged in separate complaints.

[2] While we do not reach the merits of the indispensible party issue, we note that the joinder question also contains a dispute as to the underlying facts. The Hearing Examiner allowed any of the 470 bottlers to intervene if they so wished. One intervened. Seven-Up, however, asserts that this right to intervene was "limited" and insufficient. The FTC disagrees. *See, e.g., PepsiCo., Inc.* v. *F.T.C.*, 472 F.2d 179, 183-184 (CA2 1972).

that the action was properly dismissed for lack of subject matter jurisdiction.

Federal Courts have traditionally declined to interfere with on-going agency proceedings under the doctrine requiring exhaustion of administrative remedies. See, *McGee* v. *United States,* 402 U.S. 479 (1971); *McKart* v. *United States,* 395 U.S. 185 (1969) and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-52 (1938). Furthermore, Congress has here specified a statutory scheme which contemplates judicial review of cease and desist orders issued by the FTC exclusively by a court of appeals. 15 U.S.C. §§ 45(c) and (d) provide in pertinent part that:

> (c) Any person, . . . required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, ...
>
> (d) . . . the jursdiction of the court of appeals . . . shall be exclusive.

This is fully in harmony with § 10(c) of the Administrative Procedure Act. See 5 U.S.C. § 704 and *Coca-Cola, supra,* at Slip Op. 4.

The statutory provisions for review, however, have been held not to preclude district court review under *all* circumstances. *See Elmo Division of Drive-X Co.* v. *Dixon,* 348 F.2d 342, 343 (CA D.C. 1965) and *PepsiCo, supra,* at 185. *Compare, Coca-Cola, supra,* at Slip Op. 4-5. It has been held that district courts have jurisdiction to grant relief during agency proceedings which are not yet final in certain specific instances. These include, (1) where the agency has acted in excess of its delegated powers or contrary to

a specific statutory mandate. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); (2) where the proceedings involve questions of high national interest because of their international complexion. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) and (3) where the agency has clearly violated the constitutional rights of the party seeking prior restraint. *Fay* v. *Douds*, 172 F.2d 720 (CA2 1949). Seven-Up clearly has not brought itself within any of these exceptions to the rule against judicial review of interlocutory agency rulings.

Seven-Up further asserts, however, that the FTC's refusal to join the bottlers as parties in its proceedings amounts to "final agency action for which there is no other adequate remedy in a court" under the Administrative Procedure Act. 5 U.S.C. § 704. We disagree, for while the Commission's ruling on Seven-Up's motion at the most amounts to final agency action on the joinder issue, judicial review by a court of appeals can clearly be had once the Commission's proceedings are concluded. 5 U.S.C. § 704 goes on to provide that an interlocutory agency ruling "is subject to review on the review of the final agency action." Neither are we convinced that the absence of the bottlers as parties renders the proceedings so fundamentally defective that immediate judicial relief is required. As the Fifth Circuit stated in *Coca-Cola*, at *Slip. Op.* 8-9:

> The extraordinary remedy of judicial intervention in agency proceedings still in process is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right, and only when this condition is satisfied will a court look to the general body of equitable jurisprudence and other appropriate sources for

the purpose of fashioning relief. To adopt the plaintiffs' position, on the other hand, would be to make the rule that judicial intervention to "correct" an interlocutory agency ruling is available wherever an agency ruling differed from some equitable maxim.

We conclude that Seven-Up must await a cease and desist order by the FTC, if such is ever to be issued, before jurisdiction will lie for a review of the interlocutory ruling it challenges.[3]

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

[3] We reject as without merit Seven-Up's contention that the standard of review on the joinder question, once the agency proceedings are completed, will necessarily be more stringent.